

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

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<b>United States of America,</b>	)	
	)	
Plaintiff,	)	No. <b>CR-15-1723-TUC-RCC-DTF</b>
	)	
vs.	)	Tucson, Arizona
	)	April 2, 2018
<b>Lonnie Ray Swartz,</b>	)	9:55 a.m.
	)	
Defendant.	)	
	)	

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**BEFORE: THE HONORABLE RANER C. COLLINS, JUDGE**

**REPORTER'S EXCERPTED TRANSCRIPT OF PROCEEDINGS**

**JURY TRIAL**  
**DAY 8**

**(TESTIMONY OF ALLEN FORAKER)**

Official Court Reporter:  
Candy L. Potter, RMR, CRR  
Sandra Day O'Connor U.S. Courthouse, Suite 312  
401 West Washington Street, Spc 36  
Phoenix, Arizona 85003-2151  
(602) 322-7246

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CR-15-1723-TUC-RCC - April 2, 2018

A P P E A R A N C E S

For the Government:

U.S. Attorney's Office Tucson

By: **Wallace Heath Kleindienst**, Esq.

**Mary Sue Feldmeier**, Esq.

405 West Congress Street, Suite 4800

Tucson, Arizona 85701

For the Defendant:

Law Offices of Sean C. Chapman

By: **Sean Christopher Chapman**, Esq.

100 North Stone Avenue, Suite 701

Tucson, Arizona 85701

Law Office of Jim E. Calle

By: **Jamie Ernest Calle, III**, Esq.

2315 East Hawthorne Street

Tucson, Arizona 85719

CR-15-1723-TUC-RCC - April 2, 2018

I N D E X

<u>GOVERNMENT WITNESS:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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By Mr. Chapman		71		
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By Mr. Kleindienst			93	
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<u>NO.</u>	<u>DESCRIPTION</u>		
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~~Allen Foraker - Direct Examination~~

1 (The following excerpt is the testimony of Allen Foraker.)

2 THE COURT: You may call your next witness.

3 MR. KLEINDIENST: Thank you, Your Honor.

4 Good morning.

5 The Government would call Allen Foraker to the stand. 09:55:26

6 THE CLERK: Raise your right hand, please.

7 (ALLEN FORAKER, GOVERNMENT WITNESS, SWORN.)

8 THE CLERK: Thank you. Please be seated.

9 Please pull the microphone over to you. Speak  
10 directly into it. 09:55:59

11 State your full name for the record and spell your  
12 last name.

13 THE WITNESS: My name is Allen Hugh Foraker.

14 THE COURT: Mr. Foraker, you've been informed that the  
15 Rule has been invoked in this case? 09:56:12

16 THE WITNESS: Yes, sir.

17 DIRECT EXAMINATION

18 BY MR. KLEINDIENST:

19 Q. Good morning, Mr. Foraker.

20 A. Good morning, sir. 09:56:19

21 Q. Speaking to the folks over here in the jury, can you please  
22 tell them what you do for a living right now?

23 A. I am retired right now.

24 Q. Where do you live?

25 A. In Thatcher, Arizona. 09:56:26

~~Allen Foraker - Direct Examination~~

1 Q. And prior to your retirement, did you work?

2 A. Yes, sir. I was a supervisory Border Patrol Agent.

3 Q. For how long was that?

4 A. My entire Border Patrol career was 28-and-a-half years.

5 Q. When did it start?

09:56:40

6 A. April of 1985.

7 Q. Did you have military experience prior to that?

8 A. Yes, I did.

9 Q. And in what branch did you serve?

10 A. I was a police officer in the United States Air Force.

09:56:49

11 Q. And how many years did you spend doing that?

12 A. Four.

13 Q. And after you left the Air Force, what was the next  
14 position that you had?

15 A. For one year I actually did construction and drove a truck.

09:57:00

16 And approximately one year from my separation from the Air  
17 Force I was picked up by the Border Patrol.

18 Q. And what year was that again?

19 A. 1985.

20 Q. And what year did you retire from the Border Patrol?

09:57:13

21 A. 2013.

22 Q. So that's approximately 28 years, I believe?

23 A. Yes, sir.

24 Q. Can you kind of give the jury an idea of the types of  
25 things you did as a Border Patrol Agent prior to your

09:57:26

—Allen Foraker - Direct Examination—

1 retirement?

2 A. As a supervisory agent I dealt with the day-to-day issues  
3 of scheduling, the problems, the managing the shift that I was  
4 on, taking care of annual leave requests, basically setting up  
5 schedules for the junior officers and work assignments for the  
6 junior officers to follow.

09:57:51

7 Q. What station was that at?

8 A. That was at Wilcox, Arizona.

9 Q. So just so it's clear, you ended your career as a  
10 supervisory Border Patrol Agent at Wilcox?

09:58:06

11 A. Yes, sir.

12 Q. When you first went into the Border Patrol, can you tell  
13 the jury the types of assignments you had over those 28 years  
14 before you retired?

15 A. Yes. My first assignment was on the southern border in  
16 Capitola, California. It was right on the border itself. And  
17 my job there was to patrol that border, and the mission was to  
18 prevent and deter the entry of illegal aliens and contraband  
19 into the United States.

09:58:17

20 And on a day-to-day basis we went out and patrolled  
21 east and west along that border to do that job.

09:58:39

22 Q. What else did you do as an agent?

23 A. In California, that was pretty much it.

24 Q. Okay.

25 A. And when I transferred into Silver City, which was an

09:58:59

~~Allen Foraker - Direct Examination~~

1 interior station, I didn't patrol the border there, in Silver  
2 City, New Mexico. I did a lot of interior work and work site  
3 enforcement. Which I would go and look for overstays,  
4 administrative violations of the Immigration law, and enforce  
5 it that direction. And set up a temporary checkpoint as needed 09:59:27  
6 or as ordered on the highway that went out of town.

7 Q. Silver City, New Mexico, for those of us who might know, is  
8 kind of in the southwestern part of New Mexico?

9 A. Yes, sir.

10 Q. North of I-10? 09:59:41

11 A. Yes, sir.

12 Q. And the border with Mexico is just south of I-10; correct?

13 A. Sixty miles south.

14 Q. Sixty miles.

15 And so you still had people or contraband that was 09:59:51  
16 coming across the border that you as a Border Patrol Agent in  
17 Silver City were involved in apprehending or enforcing the  
18 laws?

19 A. Yes, sir. We were a back-up to the line station of Deming  
20 and Lordsburg. And anything that would get past them would 10:00:05  
21 channel up the highway through our area.

22 Q. Did you ever work as a horse patrol officer?

23 A. Yes, I did.

24 Q. Where was that?

25 A. I worked horse patrol in San Diego, California and in 10:00:15

—Allen Foraker - Direct Examination—

1 Colville, Washington.

2 Q. And what did that include?

3 A. The horse patrol, we patrolled the border on horseback.

4 The horses are a much more viable means of transportation in

5 rough terrain. And the senses of the horse, their hearing,

10:00:34

6 their smell and their sight, are valuable tools to an agent,

7 because a horse can see, smell and hear things that an agent

8 can't, and will alert the agent to these things.

9 And, of course, when you get into the rough terrain

10 where a vehicle cannot go, the horses don't have any trouble,

10:00:54

11 the horses go right in and right out.

12 Q. So this was on the southern border and the northern border?

13 A. And the northern border.

14 Q. And the northern border.

15 Did you ever work -- operate ATVs to patrol the

10:01:05

16 border?

17 A. Yes, I operated ATVs at the Capitola Station.

18 Q. ATV meaning?

19 A. All-terrain vehicles, four wheelers.

20 Q. Four wheelers. Okay.

10:01:15

21 So it would be a fair statement to say that you ended

22 your career as a supervisory Border Patrol Agent at Wilcox,

23 that during your 28-year career you did a number of the types

24 of things that Border Patrol agents normally did on duty?

25 A. Almost everything.

10:01:34

~~Allen Foraker - Direct Examination~~

1 Q. Almost everything.

2 A. Yes, sir.

3 Q. Did there ever come a time when you became an instructor?

4 A. Yes.

5 Q. When did that happen?

10:01:41

6 A. In 1999, while I was stationed in Silver City, New Mexico,  
7 I was detailed to the Academy in Artesia for the firearms  
8 instructor training program, where I received a certification  
9 in firearms instruction.

10 Q. Okay. How long was that course?

10:01:57

11 A. Two weeks.

12 Q. Two weeks?

13 A. Yes, sir.

14 Q. Did you pursue being an instructor after you received the  
15 certification?

10:02:04

16 A. Yes, I did.

17 Q. And tell us about that.

18 A. I did a lot of local station-to-station firearms training  
19 between the Deming Station and Lordsburg Station. My station,  
20 we were residents, and my partner was also a firearms  
21 instructor. So between the two of us we would help Deming and  
22 Lordsburg run their qualification courses.

10:02:18

23 And then when I transferred up to Colville,  
24 Washington, I was the station firearms instructor and took care  
25 of our station solely as far as making sure the qualifications

10:02:36

—Allen Foraker - Direct Examination—

1 were done and that the use of force was read and understood and  
2 the documentation was signed.

3 Q. As a firearms instructor, obviously you're not teaching the  
4 whole curriculum that a Border Patrol Agent would have to study  
5 for, you're just talking about use of force; correct? 10:02:57

6 A. Yes, sir.

7 Q. And the use of a firearm.

8 A. Yes, sir. And that's only in the field.

9 Now, in 2009 I received orders to go to the Academy to  
10 teach for a minimum of three years at the basic academy 10:03:13  
11 firearms instruction.

12 Q. And that's in Artesia, New Mexico?

13 A. That's in Artesia, New Mexico.

14 Q. That would be in the central eastern part of the state of  
15 New Mexico? 10:03:29

16 A. Yes, sir.

17 Q. Is that south of the town of Roswell --

18 A. Yes, sir.

19 Q. -- that we all know with all the aliens?

20 A. Forty miles south of Roswell. 10:03:35

21 Q. How long had the Border Patrol Academy been there at  
22 Artesia?

23 A. Since 2005. Prior to that the Academy was split between  
24 Charleston, South Carolina and Glynco, Georgia.

25 Q. Okay. And so they relocated to Artesia? 10:03:52

—Allen Foraker - Direct Examination—

1 A. Yes.

2 Q. And that's where every Border Patrol Agent who joined the  
3 Border Patrol had to go through the Academy and successfully  
4 graduate before becoming an agent?

5 A. Correct.

10:04:03

6 Q. So you did that on a three-year detail?

7 A. Yes, sir.

8 Q. And what years again were you there as an instructor?

9 A. I got there June of 2009 and left October of '12.

10 Q. And that was your full-time responsibility?

10:04:14

11 A. Full-time responsibility.

12 Q. Can you just give the jury an idea of the training a Border  
13 Patrol Agent receives at the Academy, including use of force,  
14 but just the general topics that are covered?

15 A. Firearms training at the Academy is very inclusive, with  
16 presentation of a firearm, teaching the students what it looks  
17 like, how to hold it, how to operate it, how to safely load it,  
18 safely use it, how to holster it, how to draw it, how to  
19 accurately shoot it. And this goes on for a period of 15  
20 weeks.

10:04:32

10:05:06

21 Q. Is that what's called basic marksmanship instruction?

22 A. Yes, sir. The first five weeks are basic marksmanship  
23 instruction, the first five days out on the range. And then  
24 the second ten days is qualification training where we actually  
25 teach them more accuracy and operating the firearm in different

10:05:24

—Allen Foraker - Direct Examination—

1 positions, different modes, using different hands, using  
2 kneeling, using barricades, and using different distances.

3 Q. I take it that when you have a new class of enrollees, your  
4 presumption is is that whether or not they've had prior  
5 experience with firearms, you're going to teach them the way 10:05:49  
6 the Border Patrol wants them to know how to use a weapon. Is  
7 that a fair statement?

8 A. Yes, sir.

9 Q. So you start at the ground up, the very basic of how to  
10 hold a pistol? 10:06:00

11 A. Yes, sir.

12 Q. And you go through all the steps of finally then how to  
13 shoot the pistol?

14 A. Yes.

15 Q. And how to safely handle the pistol. 10:06:06

16 It's a gradual step up, in terms of at the end of the  
17 course -- at the end of the marksmanship course, what's your  
18 final objective?

19 A. Qualification.

20 Q. Qualification meaning? 10:06:19

21 A. With a pistol.

22 A passing score of 70 percent or better, which would  
23 be a score of 252 points out of 360.

24 Q. Okay. And if you didn't -- if you didn't make the  
25 70-percent cut, then you were basically dismissed from the 10:06:33

—Allen Foraker - Direct Examination—

1 Academy?

2 A. Not at that point. They're given a remedial. They're  
3 given a chance to train for a couple of more days, and then we  
4 give them a remedial training session. And they are given a  
5 chance to show us that they were capable of learning something. 10:06:51

6 Q. How many hours total were spent on training agents how to  
7 safely and accurately use a firearm, would you say, while you  
8 were there as an instructor?

9 A. I'm counting.

10 Q. Okay. 10:07:09

11 A. Fifteen days on the range, two hours every day. So there's  
12 30 hours. Because every day they have a weapon in their hand,  
13 safety is paramount, and is taught to them every second of the  
14 day. And they're watched. The line instructors are down there  
15 watching to make sure there's no safety violations. 10:07:29

16 Q. And you as an instructor were actually hands on involved in  
17 the instruction of the safe and accurate use of firearms by  
18 Border Patrol Agents?

19 A. Yes.

20 Q. Okay. Did you train them how to top off their weapon when 10:07:40  
21 they -- they graduate from the Academy, they're assigned to a  
22 station, and they're given a pistol; correct?

23 A. Yes, yes.

24 Q. And does the Border Patrol use one particular type of  
25 pistol? 10:07:54

~~Allen Foraker - Direct Examination~~

1 A. Yes.

2 Q. What kind is that?

3 A. It's a Heckler & Koch, H&K P2000 semiautomatic pistol.

4 Q. Was that in use when you were an instructor at the

5 Academy --

10:08:04

6 A. Yes, it was.

7 Q. -- in 2013 (sic)?

8 A. Yes, it was.

9 Q. And do you know if that's the same pistol being used?

10 A. I believe it is.

10:08:09

11 MR. KLEINDIENST: May I approach the witness,

12 Your Honor?

13 THE COURT: You may.

14 (Discussion off the record between counsel.)

15 BY MR. KLEINDIENST:

10:08:33

16 Q. For the record I'm showing the witness Exhibits 1A, 1B and  
17 1C, which have already been admitted into evidence.

18 If you want to open that up and take out 1A.

19 THE CLERK: Do you need scissors?

20 MR. KLEINDIENST: Yes.

10:09:01

21 MS. FELDMEIER: Your Honor, can we approach at  
22 sidebar?

23 (At sidebar on the record.)

24 MS. FELDMEIER: Your Honor, the marshals tied it down

25 because they don't want us working the action in the courtroom.

10:10:05

~~Allen Foraker - Direct Examination~~

1 Is the Court going to permit us to work the action?

2 MR. CHAPMAN: Why do we have to do this? They've seen  
3 the gun like four times already.

4 MS. FELDMEIER: I think he wants to show him the way  
5 they trained Mr. Swartz to load the gun and do the magazine  
6 exchange. 10:10:16

7 THE COURT: As long as we keep the gun and the bullets  
8 separate, we'll be okay.

9 MS. FELDMEIER: We don't have any bullets in this  
10 courtroom. 10:10:27

11 MR. CHAPMAN: It sounds like the marshal thinks it's a  
12 security issue if he's moving the action back and forth. Is  
13 that what's going on, Mary Sue?

14 MS. FELDMEIER: I have no idea what their issue is  
15 when there's no bullets in the courtroom. 10:10:36

16 THE COURT: I'm not concerned.

17 (End of discussion at sidebar.)

18 THE COURT: All right. I'm being asked to take  
19 responsibility for a steak knife.

20 I'll do it. I'm not going to use it myself. 10:11:22

21 All right. Be careful.

22 (Discussion held off the record.)

23 BY MR. KLEINDIENST:

24 Q. Now that we've gotten through that ordeal, can you raise up  
25 to the jury and show them what's marked as Exhibit 1A? 10:12:09

Allen Foraker - Direct Examination

1 A. (Indicating.)

2 Q. And do you recognize that pistol?

3 A. Yes, I do.

4 Q. And what is it?

5 A. This is an H&K P2000 .40 Smith & Wesson semiautomatic  
6 pistol.

10:12:16

7 Q. And in that box there are two magazines; correct?

8 A. Yes, there are.

9 Q. Let me ask you this question -- I'm going to jump ahead a  
10 bit. But when agents are -- actually graduated from the  
11 Academy and they're on duty, how many magazines do they  
12 normally carry with them during their job?

10:12:29

13 A. Basic is three. One in the weapon, and two on their belt.

14 Q. And the magazines that you see in front of you, are those  
15 the types of magazines that a Border Patrol Agent uses?

10:12:47

16 A. Yes, they are.

17 Q. And how many bullets does a magazine hold?

18 A. Twelve rounds.

19 Q. Now are they taught when they first come on duty at the  
20 Academy, when they first come on duty as an agent, how to load  
21 their weapon and how to top it off?

10:13:01

22 A. Yes.

23 Q. Could you explain that to the jury, please?

24 A. Yes. Because the magazines only hold 12 rounds, if  
25 you -- weapon is in this condition like this with the slide to

10:13:14

—Allen Foraker - Direct Examination—

1 the rear, and you insert a 12-round magazine in the magazine  
2 well, and then drop the slide. It takes one round out of the  
3 magazines and puts it in the tube, in the barrel. Now that  
4 leaves one round less in the magazine. So we'll take the  
5 magazine out and refill that, top that magazine off with one  
6 round.

10:13:34

7 Always carry the maximum amount that your system can  
8 hold. That's how we taught them.

9 And then once that is done there will be 13 rounds in  
10 this pistol. And then it's holstered up.

10:13:49

11 Q. Okay. Thank you very much.

12 How long is the instruction at the Academy, how long  
13 does it last for all the components of the course?

14 A. For the firearms course is a total of 15 two-hour sessions.

15 Q. Okay. But for the length of the Academy itself -- because  
16 obviously they're learning other things other than how to use a  
17 firearm; correct?

10:14:12

18 A. Yes, sir.

19 Q. But the entire duration of the Academy is how long?

20 A. At that time I believe -- it's changed since then. At that

10:14:23

21 time I believe it was 51 days of Border Patrol training. And  
22 they were given a mock language test. And depending on their  
23 score of that test, whether or not they stayed an additional  
24 eight weeks to learn Spanish. If they had a high enough score  
25 and proved that they could read, write and speak the language,

10:14:54

—Allen Foraker - Direct Examination—

1 they didn't have to stay the extra eight weeks and they were  
2 released to the field then at graduation.

3 Q. So everybody was required to learn how to speak Spanish?

4 A. Yes, sir.

5 Q. Why was that?

10:15:08

6 A. Because the people that we deal with, majority of the time,  
7 are from Latin America.

8 Q. Okay. Obviously we have the Canadian border, and that's an  
9 English speaking -- at least part of the Canadian border --

10 A. Yes, sir.

10:15:24

11 Q. -- is English speaking.

12 But a lot of the agents are going to the southwest  
13 border; correct?

14 A. Yes, sir. And that's where, for the most part, everybody  
15 starts there.

10:15:32

16 Q. So before you can actually graduate from the Academy you  
17 have to show proficiency in Spanish?

18 A. Again, 70 percent, yes, sir.

19 Q. Seventy percent.

20 And if you don't measure up to that, then you're held  
21 over to continue to take Spanish to improve your fluency?

10:15:40

22 A. No, sir. If you do not pass Spanish, you're asked to  
23 leave.

24 Q. You don't graduate?

25 A. You don't graduate.

10:15:55

~~Allen Foraker - Direct Examination~~

1 Q. Other than the basic marksmanship training that you talked  
2 about, did you also teach what's called a police practical  
3 course --

4 A. Yes, sir.

5 Q. -- to the agents?

10:16:10

6 A. Yes, sir.

7 Q. And can you tell the jury what that was about?

8 A. Yes, sir. The police practical course, we tried to show  
9 them the movements and the positions that they would be in in  
10 an everyday patrol situation. We didn't get into vehicles  
11 during basic, but we would start the training at the  
12 one-and-a-half yard line.

10:16:22

13 At that point we would show them that you could  
14 operate this weapon without the use of the front sights when  
15 you're only a yard and a half away. And how to accurately  
16 point and shoot this weapon on your target.

10:16:42

17 And then we worked back from one-and-a-half to three,  
18 and then to seven, and then to 15, and then to 25. And at each  
19 distance we introduced a different stance or a different  
20 modification to the stance. We also introduced switching  
21 hands, we introduced kneeling, we introduced barricaded  
22 shooting.

10:17:09

23 Q. What's barricaded shooting?

24 A. Barricaded shooting is, if you can draw a picture in your  
25 mind of the corner of a building, you are behind the corner of

10:17:26

—Allen Foraker - Direct Examination—

1 that building. Now the building is cover for you at the time,  
2 and you have to step out from the edge of that cover to be able  
3 to engage your target down the side of that building, and then  
4 come back into cover.

5 Q. Okay. So that's a cover situation that they're taught? 10:17:49

6 A. Yes, sir.

7 Q. And how long is the police practical course that you  
8 discuss -- or teach?

9 A. Ten days.

10 Q. Ten days. 10:18:02

11 Of course, obviously while they're at the Academy  
12 they're taking other classes in other subject matters, not just  
13 the use of firearms; correct?

14 A. Correct.

15 Q. And you were just the use of force instructor? 10:18:16

16 A. And firearms. Firearms and use of force.

17 Q. And during the time you were at the Academy and you're  
18 teaching use of force, would it all be in one block or would it  
19 be spread out?

20 A. It's spread out. 10:18:29

21 Q. How so?

22 A. After the PPC is done and they have qualified on the  
23 handgun, we move them to a rifle course, which is the N4, and  
24 at that time was only four hours. And then after that course  
25 we moved them into judgment pistol shooting. 10:18:46

~~Allen Foraker - Direct Examination~~

1 Q. Was the training on the use of firearms interspersed during  
2 your other curriculum?

3 A. Yes, it is.

4 Q. Okay. So it wasn't all one concentrated period of time?

5 A. No, sir.

10:19:00

6 Q. It was spread out during the entire time they're there at  
7 the Academy?

8 A. We had them two hours a day.

9 Q. Every day?

10 A. Yes.

10:19:06

11 Q. Okay. So it was a continual learning process on the safe  
12 and accurate use of a firearm?

13 A. Yes, sir.

14 Q. Okay. By the way, what's the typical size of a class say  
15 back in 2010?

10:19:18

16 A. They normally started with 50 students, and the attrition  
17 rate started very quickly. An average graduation of a class  
18 would be 25 to 30 students.

19 Q. So you lose about half by attrition?

20 A. Yes, sir.

10:19:38

21 Q. For whatever reason or various reasons?

22 A. Yes, sir.

23 Q. Okay. Now that you've spent that time training the agents  
24 how to safely and accurately use the pistol, are they given any  
25 instruction on when to use lethal force?

10:19:51

~~Allen Foraker - Direct Examination~~

1 A. Yes, sir. During judgment pistol shooting, we give them a  
2 two-hour lecture via a PowerPoint, and we try to show them the  
3 ideas that they'll have to incorporate to make a decision on  
4 whether or not to utilize deadly force.

5 Q. Let me back up just a minute before we get into that topic. 10:20:14

6 Are you familiar with a Use of Force Policy Handbook  
7 that the Customs & Border Protection Agency published as to  
8 when you can use lethal force?

9 A. Yes, I am.

10 Q. And were the students at the Academy given that Handbook? 10:20:32

11 A. Yes, they were.

12 Q. And what was the instruction to them with respect to that  
13 Handbook?

14 A. We would tell the students every day that we covered  
15 something to go read their book. This is your homework, go 10:20:43  
16 read your book. We had no way of enforcing that, but we told  
17 them every day, read this book, you need to know it.

18 Q. Does that book set forth, among other things, the standard  
19 or the guideline as to when an officer can use lethal force  
20 after he's been trained to use the firearm? 10:21:06

21 A. Yes, it does.

22 (Discussion off the record between Government counsel.)

23 MR. KLEINDIENST: May I approach the witness,  
24 Your Honor?

25 THE COURT: You may. 10:21:23

~~Allen Foraker - Direct Examination~~

1 BY MR. KLEINDIENST:

2 Q. I'm going to hand you what's called a Use of Force Policy  
3 Handbook Office of Training and Development October 2010.

4 It's not marked, but is that the Handbook that you  
5 have just discussed? 10:21:37

6 A. Yes, it is.

7 MR. CHAPMAN: What's the exhibit number?

8 MR. KLEINDIENST: It's not marked.

9 (Discussion off the record between counsel.)

10 BY MR. KLEINDIENST: 10:22:00

11 Q. You want to just hold that up to the jury? I don't know if  
12 you did or not.

13 Every student is given that book?

14 A. Yes, they are.

15 Q. And that's dated October of 2010? 10:22:11

16 A. Yes, sir.

17 Q. And in that book, does it cover when an officer can use  
18 lethal -- when I say "lethal" -- deadly force?

19 A. Yes.

20 Q. Let me show you what's marked as Exhibit 280. 10:22:22

21 MR. KLEINDIENST: May I approach the witness,  
22 Your Honor?

23 THE COURT: You may.

24 BY MR. KLEINDIENST:

25 Q. Take a look at Exhibit 280. 10:22:49

~~Allen Foraker - Direct Examination~~

1 THE COURT: Can I see counsel for a second?

2 (At sidebar on the record.)

3 THE COURT: Do you have a copy of 280?

4 MR. CHAPMAN: Yeah, I didn't -- he didn't know what  
5 the exhibit number was. But I have it on my computer. 10:23:28

6 But just for the record, I'm going to object if he  
7 tries to admit the Handbook or other written documents. I  
8 think they're hearsay and they're cumulative.

9 If he wants to have the witness explain the  
10 policy -- specific policies, that type of thing, based on the 10:23:43  
11 Handbook or even read out of the Handbook, that's something  
12 else.

13 THE COURT: All right.

14 MR. CHAPMAN: But we're talking about hundreds of  
15 pages. 10:23:51

16 MR. KLEINDIENST: I'm not going to have him read  
17 hundreds of pages. But I have -- narrowing on when they can  
18 use lethal force, there are two statements that the agents are  
19 taught, and I'm going to have him tell the jury that's what  
20 they were taught. 10:24:04

21 So I am going to have him read a portion of that  
22 excerpt.

23 MR. CHAPMAN: I just don't want the document -- I'm  
24 going to object to any documents being admitted.

25 MR. KLEINDIENST: I'm going to put in the chapter on 10:24:11

~~Allen Foraker - Direct Examination~~

1 use of force, which is what they're taught.

2 MR. CHAPMAN: That's what I'm objecting to, because  
3 it's an entire chapter.

4 THE COURT: I'm probably not going to let you put in  
5 the written word, but you can have him read it. 10:24:23

6 (End of discussion at sidebar.)

7 THE COURT: You may continue.

8 (Discussion off the record between Government counsel.)

9 BY MR. KLEINDIENST:

10 Q. Exhibit No. 280, which I've just handed you, is basically 10:24:56  
11 the chapter in the Use of Force Policy Handbook that you use to  
12 instruct the students on when they can use lethal force under  
13 the law. Is that a fair statement?

14 A. That is.

15 Q. There are other parts of the handbook that touch on it, but 10:25:11  
16 aren't really germane, and so I'm not going to have you discuss  
17 the entire handbook.

18 A. Yes, sir.

19 Q. Okay. So looking at Exhibit 280, do you recognize that to  
20 be that chapter on when you can use lethal force? 10:25:23

21 A. Yes, I do.

22 Q. And did you use this Use of Force Policy Handbook when you  
23 were training the agents on when they can use lethal force?

24 A. I would refer to this in my office, but I never took this  
25 into the classroom, because we used the PowerPoint for that. 10:25:43

~~Allen Foraker - Direct Examination~~

1 Q. Okay. Does a Use of Force Handbook which each agent got  
2 set forth when lethal force can be used?

3 A. Yes, sir, it does. Chapter 4, the very first paragraph.

4 Q. Okay. Let me put it up on the ELMO.

5 This would be Chapter 4, page 14.

10:26:10

6 Can you read what's highlighted in yellow for the  
7 jury, please?

8 A. Only that force which is both reasonable and necessary may  
9 be used in any given situation.

10 Reasonable means that there are objective reasons that  
11 justify the degree of force to be used in the given situation,  
12 up to and including deadly force. The reasonableness of a  
13 particular use of force is judged from the perspective of a  
14 reasonable officer or agent on the scene, and its calculus must  
15 embody an allowance for the fact that law enforcement officers  
16 and agents are often forced to make split-second decisions  
17 about the amount of force necessary in a particular situation.

10:26:33

10:26:58

18 Necessary means that some force is required to carry  
19 out one's duties as a law enforcement officer or agent.

20 Q. So the two key words in that are what?

10:27:19

21 A. Reasonable and necessary.

22 Q. And what is the word -- how is the word "necessary" taught  
23 to the agents?

24 A. Necessary is synonymous with last resort.

25 Q. It's synonymous with what?

10:27:34

—Allen Foraker - Direct Examination—

1 A. Last resort.

2 Q. What do you mean by that?

3 A. All other means have failed. All other means of viable  
4 alternatives have failed, and deadly force is the only resort  
5 left.

10:27:55

6 MR. CHAPMAN: I'm sorry, Your Honor, is he reading  
7 from the manual or is this his opinion?

8 MR. KLEINDIENST: No, this is his instruction.

9 BY MR. KLEINDIENST:

10 Q. This is how they were instructed at the Academy?

10:28:03

11 A. Yes.

12 Q. Okay. And turning to the next page, page 15, under  
13 Subchapter C, Use of Deadly Force, the first paragraph just  
14 indicates that the use of deadly force is governed by the  
15 handbook that we've shown to the jury that we're not going to  
16 read the entire thing; correct?

10:28:28

17 A. Yes, sir.

18 Q. And every agent gets that handbook?

19 A. Yes, sir.

20 Q. Okay. Can you read paragraph 2 of chapter C -- or  
21 paragraph C?

10:28:35

22 A. Authorized officers or agents may use deadly force only  
23 when necessary, that is, when the officer or agent has a  
24 reasonable belief that the subject of such force poses an  
25 imminent danger of death or serious physical injury to the

10:28:54

—Allen Foraker - Direct Examination—

1 officer or agent or to another person.

2 Q. Again, the two concepts, that it must be necessary and it  
3 must be a reasonable belief, are incorporated in that paragraph  
4 as well?

5 A. Necessary is mentioned in the paragraph.

10:29:09

6 Q. Now, looking at paragraph 4 -- or section 4, can you read  
7 that to the jury?

8 A. Discharging a firearm at a person shall be done only with  
9 the intent of stopping that person from continuing the  
10 threatening behavior that justifies the use of deadly force.

10:29:27

11 Q. And these are concepts that are taught by you and the other  
12 instructors to the students at the Academy?

13 A. Yes.

14 Q. Does that mean if you use deadly force and you don't kill  
15 the individual, but you stop him from committing -- continuing  
16 his threatening behavior, you have to stop shooting?

10:29:41

17 A. Correct.

18 Q. You're not allowed to just eliminate the person as a human  
19 being?

20 A. No.

10:29:53

21 Q. And the next paragraph?

22 A. Deadly force is not authorized solely to prevent the escape  
23 of a fleeing subject. Deadly force against a fleeing subject  
24 is only authorized, in accordance with paragraphs above, if  
25 there is probable cause to believe that, A, the subject has

10:30:11

—Allen Foraker - Direct Examination—

1 inflicted or threatens to inflict serious physical injury or  
2 death, and, B, the escape of the subject poses an imminent  
3 threat of death or serious physical injury to the officer or  
4 agent or to another person.

5 Q. And this concept is also taught to the students during the  
6 instruction program?

10:30:34

7 A. Yes, it is.

8 Q. So what does it basically mean in terms of when you can  
9 shoot at somebody who is running away from you?

10 A. If they have committed a felonious act that inflicted pain  
11 or injury, a grievous bodily harm, and they still have the  
12 means to inflict that injury or bodily harm on somebody else.

10:30:47

13 Q. Let me give you an example of a gun. If the agent was  
14 confronted with somebody who had a gun and he shot him, and the  
15 person with the gun fled but still had the gun with him, and  
16 there are other people in the area where he was fleeing to,  
17 could you use deadly force at that point in time, even though  
18 his back was turned to you?

10:31:15

19 A. Yes.

20 Q. So it would depend on whether or not -- whatever weapon he  
21 had was still -- had the potential of causing grievous  
22 potential injury to another human being?

10:31:27

23 A. Yes.

24 Q. If that does not exist, is he authorized to shoot?

25 A. No.

10:31:43

—Allen Foraker - Direct Examination—

1 Q. Are the students at the Academy required to acknowledge  
2 their receipt of the Use of Force Policy Handbook, and that  
3 they are to abide by the conditions therein?

4 A. Yes.

5 Q. Okay. And is that -- is that done during their time at the 10:32:27  
6 Academy?

7 A. Yes.

8 MR. KLEINDIENST: May I approach the witness,  
9 Your Honor?

10 THE COURT: You may. 10:32:36

11 BY MR. KLEINDIENST:

12 Q. And actually let me show you Exhibit 282 as well.

13 Can you tell the jury what those two exhibits are, 281  
14 and 282?

15 A. 281 is an employee acknowledgement of possession of a copy 10:33:23  
16 of this book.

17 I need to step back. 281 is acknowledgement of a copy  
18 of an interim book that was used prior to the issuance of this  
19 book. 282 is acknowledgement of receipt of this book.

20 Q. And does it impose some requirements or obligations on the 10:34:09  
21 student to study the book and to abide by the provisions  
22 therein?

23 A. Yes.

24 MR. KLEINDIENST: Now I would move for Exhibit 281 and  
25 282 into evidence, Your Honor. 10:34:21

~~Allen Foraker - Direct Examination~~

1 MR. CHAPMAN: No objection.

2 THE COURT: They'll be admitted, 281 and 282.

3 (Exhibit No. 281 and 282 admitted into evidence.)

4 BY MR. KLEINDIENST:

5 Q. Basically there are forms that each student is required to  
6 fill out to acknowledge receipt of either the interim book or  
7 the actual book itself, the one that came out in 2010?

10:34:28

8 A. Yes, sir.

9 Q. And who was the student that signed those two certificates?

10 A. The students that signed them?

10:34:44

11 Q. Yes.

12 A. Mr. Swartz's signature is on both of these.

13 Q. Does he have a first name?

14 A. Lonnie R.

15 Q. Lonnie R.

10:34:57

16 And is there an instructor that also then signs off  
17 saying that you're basically attesting to the fact that he's  
18 been given the book and he's signed his name to it?

19 A. Yes, sir. And it's my signature on both copies.

20 Q. Your signature is on both copies?

10:35:08

21 A. Yes.

22 Q. What does that mean, Mr. Foraker, as to whether or not  
23 Mr. Swartz was a student at the time that you were there?

24 A. That means that he was a student of mine at the Academy,  
25 and that I gave him those books.

10:35:25

—Allen Foraker - Direct Examination—

1 Q. Is every student required to sign an acknowledgement of the  
2 receipt of these books?

3 A. I didn't hear you.

4 Q. Is every student required to sign them?

5 A. Yes, sir.

10:35:46

6 Q. Okay. Now we've heard about the concept that in order to  
7 use lethal force it must be reasonable under the circumstances  
8 and necessary being the last resort; correct?

9 A. Yes, sir.

10 Q. Do you also then instruct the jury (sic) on how to within  
11 that framework, of reasonable and necessary, how to make a  
12 determination whether or not to use deadly force? Do you  
13 understand my question?

10:35:57

14 A. Not really.

15 THE COURT: So try another question.

10:36:14

16 MR. KLEINDIENST: Neither did I.

17 BY MR. KLEINDIENST:

18 Q. What else -- what other instructions do they receive, other  
19 than the instruction on the guideline -- or not the guidelines,  
20 but the law as to use of deadly force? Did you provide them  
21 with any other instruction to educate them on when to make the  
22 assessment to use deadly force?

10:36:28

23 A. Yes, sir.

24 Q. Okay.

25 A. We had a four-hour training block. It was two days, two

10:36:38

—Allen Foraker - Direct Examination—

1 two-hour blocks, of judgment pistol shooting.

2 Q. You call it judgment pistol shooting?

3 A. It was called judgment pistol shooting. That was the name  
4 of the training block.

5 Q. And that was two hours in length? 10:36:56

6 A. Two hours in length, for two days.

7 Q. For two days.

8 And what was the purpose of the judgment pistol  
9 shooting?

10 A. To expose the students to possible scenarios where they can 10:37:07  
11 learn to make decisions on how and when to use deadly force.

12 Q. If the conditions of reasonableness and necessary are  
13 there?

14 A. Correct.

15 MR. KLEINDIENST: Okay. May I approach the witness, 10:37:25  
16 Your Honor?

17 THE COURT: You may.

18 MR. KLEINDIENST: Let me hand you what's been marked  
19 as Exhibit 283.

20 Judge, I was going to move into evidence Exhibit 280, 10:37:37  
21 which is an excerpt of a Use of Force Policy Handbook that I  
22 showed on the ELMO.

23 THE COURT: Let me see counsel.

24 (At sidebar on the record.)

25 MR. CHAPMAN: Well, looking through it also there's 10:37:58

~~Allen Foraker - Direct Examination~~

1 citations to case law, there's references to other things not  
2 covered by Mr. Kleindienst's testimony. I think --

3 THE COURT: You mean, Mr. --

4 MR. CHAPMAN: Foraker's testimony.

5 So I think it's -- I think it's potentially misleading 10:38:12  
6 to the jury. It's hearsay.

7 THE COURT: Can I see the exhibit that you're talking  
8 about?

9 MR. KLEINDIENST: Yes.

10 This is the excerpt. 10:38:36

11 THE COURT: This is the whole excerpt?

12 MR. KLEINDIENST: Just a checklist on the use of  
13 deadly force.

14 THE COURT: I don't think the whole excerpt comes in.  
15 What I'll let you put in is those specific sections 10:38:58  
16 that you had him read.

17 MR. KLEINDIENST: That's fine.

18 MR. CHAPMAN: You can redact those and submit them  
19 later.

20 MR. KLEINDIENST: Yeah, I'll to that. 10:39:07

21 THE COURT: I'll let you do that.

22 (End of discussion at sidebar.)

23 (Discussion off the record between Government counsel.)

24 MR. KLEINDIENST: Thank you, Your Honor.

25 THE COURT: You may proceed. 10:39:40

~~Allen Foraker - Direct Examination~~

1 BY MR. KLEINDIENST:

2 Q. Mr. Foraker we've handed you Exhibit No. 283; correct?

3 A. Correct.

4 Q. And do you recognize that?

5 A. Yes, I do.

10:39:48

6 Q. And what is that?

7 A. This is the printed copy of the PowerPoint program that we  
8 used during the first hour of judgment pistol shooting  
9 training.

10 Q. And how is this presented to the students?

10:40:01

11 A. On an overhead projector in a classroom.

12 Q. On an overhead projector.

13 And the instructors, when going through each slide, do  
14 they make comments?

15 A. Correct.

10:40:15

16 Q. Do the comments amplify or add to what's on the slide?

17 A. We answer questions if they exist. If there are no  
18 questions, we move on to the next one. This is one case we  
19 allow interruptions.

20 Q. Okay. By the student?

10:40:32

21 A. Yes, if they have questions.

22 Q. If they have questions.

23 Okay. And the purpose of the judgment pistol shooting  
24 is to do what?

25 A. Is to provide them with the ability and the ideas to

10:40:41

~~Allen Foraker - Direct Examination~~

1 hopefully teach them that they can make rational decisions  
2 concerning deadly force.

3 MR. KLEINDIENST: Okay. I would move Exhibit 283 into  
4 evidence, Your Honor.

5 THE COURT: With the modifications that we spoke  
6 about, that can be admitted. 10:40:59

7 MR. KLEINDIENST: It's a different exhibit.

8 THE COURT: 283 are the PowerPoints?

9 MR. KLEINDIENST: 283 is the PowerPoint presentation.  
10 It's different from 280, which we discussed at the bench. 10:41:12

11 MR. CHAPMAN: We haven't addressed that. Before  
12 that's admitted I'd like to address it.

13 (At sidebar on the record.)

14 THE COURT: These are the actual PowerPoints?

15 MR. KLEINDIENST: That are given to the students in  
16 slides. 10:41:38

17 I don't intend to discuss every one of them,  
18 Your Honor. And I can just mark as an exhibit the ones I  
19 intend to use, if that solves the objection.

20 MR. CHAPMAN: Well, I just think it's cumulative. 10:41:49

21 THE COURT: It is kind of getting over the top.  
22 They're going to get part of 280, they'll get part of the other  
23 slides, and 280 and 283 are the same thing.

24 MR. KLEINDIENST: But it gets into the concept of  
25 jeopardy in terms of when they can make a determination when to 10:42:02

~~Allen Foraker - Direct Examination~~

1 shoot. It goes beyond just the guideline itself. This is how  
2 they're taught.

3 THE COURT: Let's do this: Let's show the specific  
4 slides you want to show at this point in time.

5 MR. KLEINDIENST: Okay. 10:42:13

6 THE COURT: And only those particular slides will be  
7 possibly admitted.

8 MR. KLEINDIENST: Okay.

9 THE COURT: Not this whole book.

10 MR. KLEINDIENST: Okay. 10:42:20

11 (End of discussion at sidebar.)

12 MR. KLEINDIENST: I don't want to show you all the  
13 slides because I'll bore the jury to death. Okay? So we'll  
14 just go through some selective ones that are pertinent.

15 THE COURT: When you do that, tell us which page  
16 number. 10:42:49

17 MR. KLEINDIENST: I will, Your Honor.

18 BY MR. KLEINDIENST:

19 Q. If you want to follow along with me with your copy. This  
20 is the very beginning of the slide presentation; correct? 10:43:05

21 A. Yes.

22 Q. And what is it telling the student?

23 A. It gives them a definition of judgment, why they're in that  
24 class, what the class is set up to do for them.

25 Q. This is the first -- actually the first page after the 10:43:21

Allen Foraker - Direct Examination

1 cover sheet; correct?

2 A. Correct.

3 Q. The second page of the --

4 A. Yes.

5 Q. -- PowerPoint presentation, can you explain that to the  
6 jury?

10:43:29

7 A. This is telling them when they may and may not use deadly  
8 force.

9 Q. Okay. Now it says the Department of Justice Policy  
10 Statement and U.S. Customs and Border Protection is part of  
11 Homeland Security. What is the reason for the Department of  
12 Justice's Policy Statement? Is it the same at CBP's?

10:43:45

13 A. Yes, sir. The reason that says DOJ is because of the age  
14 of this PowerPoint. This is the same PowerPoint that's been  
15 used at the Academy for years. And this predates March of  
16 2003, when INS basically dissolved and we became CBP.

10:44:04

17 Q. Okay. Does the U.S. Customs & Border Protection -- we've  
18 read from the Use of Force Handbook, is it the same thing?

19 A. Yes.

20 Q. This will be the fourth page in the slide. Can you explain  
21 this to the jury?

10:44:27

22 A. Yes. Discharging of a firearm shall be done only with the  
23 intent of stopping a person or animal from continuing the  
24 threatening behavior which justifies the use of deadly force.

25 It's a reminder to the students that they're not

10:44:53

—Allen Foraker - Direct Examination—

1 trying to kill whatever they're shooting at, they're trying to  
2 stop whatever they're shooting at.

3 Q. Stop the threat.

4 A. Stop the threat.

5 Q. Not necessarily killing the person.

10:45:11

6 A. Correct.

7 Q. Those two can be two different things.

8 A. Yes, they could.

9 Q. Could be the same, could be two different things.

10 A. Yes, they could.

10:45:19

11 Q. And then the second sentence?

12 A. When deadly force is justified, an officer may use any  
13 level of force necessary up to and including deadly force.

14 Q. And the next page in sequence is Section 7.B-1.

15 A. A firearm may be discharged when the officer reasonably

10:45:39

16 believes that the person at whom the firearm is to be  
17 discharged possesses -- this says -- means, intent and  
18 opportunity of causing death or grievous bodily harm upon the  
19 officer or another person.

20 Q. How is this explained to the students?

10:45:59

21 A. These three words that are italicized, means, intent and  
22 opportunity, are the three corners of the jeopardy triangle.

23 Q. And we'll get to that in a minute.

24 A. Yes, sir.

25 Q. And again, it emphasizes that it has to be either the

10:46:12

—Allen Foraker - Direct Examination—

1 ability to cause death or grievous bodily harm; correct?

2 A. Correct.

3 Q. Not just bodily harm, but grievous bodily harm.

4 A. Grievous.

5 Q. And that's explained later on in the PowerPoint  
6 presentation?

10:46:25

7 A. There's an attempt to explain it.

8 Q. Okay. But do you all talk about that in class --

9 A. Yes.

10 Q. -- what that means?

10:46:33

11 A. Yes.

12 Q. I'm going to pass over a couple that aren't germane.

13 Now here's the definition of reasonableness of a  
14 belief, which is one of the key components. Can you explain it  
15 to the jury?

10:46:57

16 A. Read it first, the reasonableness of a belief or decision  
17 must be viewed from the perspective of the officer on the  
18 scene, who may often be forced to make split-second decisions  
19 in circumstances that are tense, unpredictable, and rapidly  
20 evolving.

10:47:16

21 And this was also contained in the first paragraph of  
22 Exhibit 280.

23 Q. Now does that mean that you can't second judge an officer  
24 when he uses lethal force?

25 A. That means you shouldn't second judge an officer without

10:47:29

~~Allen Foraker - Direct Examination~~

1 all the facts.

2 Q. Without all the facts?

3 A. Correct.

4 Q. So it's important to know the facts that were confronting  
5 him before you can make a determination if, in fact, it was  
6 reasonable or not?

10:47:40

7 A. Yes.

8 Q. And that would be the totality of the circumstances facing  
9 the officer?

10 A. Correct.

10:47:51

11 Q. Okay. And the next page is the definition page, and it  
12 says, when necessary is defined as?

13 A. Last resort.

14 Q. Last resort means no other way out?

15 A. No other way out. All other avenues to come to a  
16 resolution of the situation have failed.

10:48:05

17 Q. Okay. And then how does it define imminent danger of  
18 grievous bodily injury?

19 A. The impending, threatening, looming, or about to happen.

20 There's a person standing in front of you or in  
21 proximity of you that has the ability and the intent to use a  
22 chosen weapon against you, would put you in imminent danger.

10:48:30

23 Q. Of death or serious bodily injury?

24 A. Of death or serious bodily injury.

25 Q. Now you've talked about the jeopardy triangle in your

10:48:55

—Allen Foraker - Direct Examination—

1 PowerPoint presentation. The slide I have up on the ELMO is  
2 called Legal Justification. Can you explain how you explain  
3 that to the jury -- I mean, to the students?

4 A. Two court decisions that a lot of our actions are based  
5 on -- let me rephrase that. 10:49:32

6 Two court decisions that a lot of the Border Patrol's  
7 actions are based on are *Garner versus Tennessee* and *Graham*  
8 *versus Connor*.

9 *Garner versus Tennessee* has to deal with a fleeing  
10 felon, which I explained a little earlier. 10:49:48

11 Q. And how about *Graham versus Connor*?

12 A. *Graham versus Connor* has to deal with reasonableness of the  
13 facts and circumstances observed by the officer, and the  
14 inferences of those facts and circumstances that would lead  
15 that officer to believe that what he's seeing is true. 10:50:10

16 If he has probable cause to believe that a crime is  
17 being committed, then it is within reason to investigate that  
18 crime, or that violation.

19 Q. And now we get into the concept of jeopardy; correct?

20 A. Yes. Jeopardy must exist in order to be legally justified  
21 in using deadly force. 10:50:34

22 Q. That's assuming that both necessary and reasonableness are  
23 in play?

24 A. Yes.

25 Q. Okay. What are the elements of jeopardy the students are 10:50:44

Allen Foraker - Direct Examination

1 taught?

2 A. This says, means, opportunity, intent.

3 The word "means" has been changed to "ability."

4 Q. And the next page defines means or ability; correct?

5 A. The definition of ability is, the person you are about to  
6 use deadly force against must have the means to cause you or  
7 someone else grievous bodily harm or death.

10:51:01

8 That means they must have access to something of a  
9 tool, a club, a bottle, a knife, a gun, or their physical  
10 stature and their physical capabilities.

10:51:26

11 Q. Does the concept of rocking come up during the training  
12 under the judgment pistol shooting?

13 A. Yes.

14 Q. And is rocking described to the students as a potential  
15 object that falls within means and ability as a weapon?

10:51:40

16 A. Rockings are taught to them on -- it's as a case-by-case  
17 basis. Rocks can be lethal, and rocks, some are not lethal.

18 Q. Okay. Just because -- you don't teach students that just  
19 because you're rocked you can shoot?

20 A. No.

10:51:57

21 Q. That doesn't equal that?

22 A. No. It has to fall under these three items, these three  
23 points of jeopardy.

24 Q. Then the next slide deals with the second prong of the  
25 triangle, opportunity. Can you explain that to the jury, how

10:52:11

~~Allen Foraker - Direct Examination~~

1 you explain that to the students?

2 A. The person you are about to use deadly force against -- on,  
3 must have the opportunity to cause you grievous bodily harm or  
4 death. This involves proximity and/or control of their chosen  
5 weapon.

10:52:29

6 Q. How do you talk about the concept of proximity under  
7 opportunity?

8 A. Let's use a rock thrower for an example. A person can only  
9 throw a rock so far. It's not like a bullet from a gun. If  
10 the person is a vast distance away, then -- and he's a rock  
11 thrower, he does not have the proximity, whereas the same  
12 person with a gun would have proximity.

10:52:49

13 Q. And would proximity with a rock thrower change if the  
14 person with the rock was in close proximity to the agent?

15 A. Yes.

10:53:11

16 Q. So the distance between the person with the rock and the  
17 agent is an important role in determining proximity. Is that a  
18 fair statement?

19 A. Yes.

20 Q. And then the final part of the triangle is intent. Can you  
21 describe that as to how the students are taught?

10:53:21

22 A. The intent -- the person that you are about to use deadly  
23 force on must have displayed the manifested intent to cause you  
24 or someone else grievous bodily harm or death. And that is the  
25 attempt to use the chosen weapon. And the name for that is

10:53:46

—Allen Foraker - Direct Examination—

1 deadly force movement.

2 Q. Do you want to give an example of how that might be with,  
3 say, a person who has a gun?

4 A. Yes. Because a person has a gun in his hand, and if he is  
5 unaware of the officer's presence, we have no intent of this  
6 person to use a weapon against an officer. 10:54:05

7 However, if the person is aware of the officer's  
8 presence, and the person chooses to retrieve the weapon, that  
9 shows intent to use that weapon.

10 Q. What if he just kept the gun down by his side and didn't  
11 point it at the officer, would jeopardy exist under this -- 10:54:29

12 A. There still is no intent. He has not brought the weapon to  
13 bear.

14 Q. What would be an example of that?

15 A. If he raises the muzzle of the weapon in the direction of  
16 anybody, not just the officer, anybody. 10:54:43

17 Q. Anybody.

18 Then again here we now have a summary of the jeopardy  
19 triangle with the concepts that -- that is what the students  
20 are instructed on as to making that assessment, the jeopardy  
21 triangle? 10:55:00

22 A. Yes.

23 Q. And all three must exist together before jeopardy attaches?

24 A. Yes, sir.

25 Q. I'm going to skip ahead, and now the subject on fleeing 10:55:12

—Allen Foraker - Direct Examination—

1 subject. Again Department of Justice, because the  
2 PowerPoint -- because of the -- yeah, the date of the  
3 PowerPoint.

4 Can you explain to the jury how the students are  
5 instructed on this concept? 10:55:36

6 A. Yes. As I read in Exhibit 280, the deadly force may be  
7 used to prevent the escape of a fleeing subject if there is  
8 probable cause to believe that the -- two items here, that the  
9 subject has committed a felony involving the infliction or  
10 threatened infliction of serious physical injury or death, and 10:56:03  
11 the escape of a subject would pose an imminent danger of  
12 serious physical injury to the officer or another person.

13 If an officer comes up on a person robbing at gunpoint  
14 somebody on the street, comes up on this person, the person  
15 turns -- the subject turns and sees the officer and takes off 10:56:34  
16 running with the gun still in hand, fits the fleeing subject  
17 part of this.

18 Q. What if he dropped his gun and just ran away?

19 A. Then it no longer has intent.

20 Q. So if he no longer has the weapon that could have caused 10:56:53  
21 death or serious grievous injury, then obviously you cannot  
22 shoot --

23 A. Correct.

24 Q. -- in the back?

25 A. He dropped the weapon, that was the corner of the triangle 10:57:04

~~Allen Foraker - Direct Examination~~

1 that disappeared.

2 Q. Okay. That's all I have for the PowerPoint presentation.

3 Thank you, Mr. Foraker.

4 Now, so you have the PowerPoint presentation that you

5 give to the students and you address the issues contained

10:57:29

6 therein. What's the next part of judgment pistol shooting?

7 How are they next trained?

8 A. After the PowerPoint presentation we take the students out

9 into a building that has video machines, reactive video

10 machines set up that plays scenarios. And they use a training

10:57:50

11 gun -- and there's a supervisor with them, and the supervisor

12 operates the video for the students.

13 They're given five scenes, five different scenarios.

14 And they're coached through these scenarios to help them pay

15 attention to what they're looking at. A lot of times we put

10:58:16

16 them in there and they don't understand what they're seeing.

17 So we coach them through these five scenes. And this is all

18 training at this point.

19 The next day they come back, they're each given ten

20 scenes with no help.

10:58:34

21 Q. What do the scenes include?

22 A. Use of force situations, nonuse of force situations.

23 They're deadly force -- the scenes are all set up, they're

24 either deadly force or they're not deadly force.

25 Q. And the purpose of that is to do what with the students?

10:58:52

—Allen Foraker - Direct Examination—

1 A. Is to try to give the student an experience that he could  
2 be watchful for out in the field.

3 The scenarios are based -- are made by the Border  
4 Patrol out in Border Patrol conditions.

5 Q. Okay. Such as along the southwest border --

10:59:10

6 A. Yes.

7 Q. -- those conditions would be duplicated in this exercise?

8 A. Yes.

9 Q. And I take it that -- so they are confronted with a  
10 situation, and after having been given the instruction, they're  
11 to determine whether or not to use deadly force or not?

10:59:21

12 A. Yes.

13 Q. Based on the guidelines that we've just seen?

14 A. Yes.

15 Q. And how long does that take, how many hours of instruction?

10:59:32

16 A. It's a two-hour block of instruction. And the students  
17 come in, they take their ten scenes, which lasts probably 15 to  
18 20 minutes per student. And then use of force is over.

19 The ten scenes is a test, and it is pass or fail.

20 They pass all ten scenes or they fail the course.

10:59:55

21 Q. What happens if they don't -- well, what happens if they  
22 fail the course?

23 A. There is a remedial immediately, and they're given another  
24 ten scenes. And if they fail one of them again, they're  
25 terminated.

11:00:13

~~Allen Foraker - Direct Examination~~

1 Q. From the Academy?

2 A. Yes.

3 MR. KLEINDIENST: May I approach the witness,  
4 Your Honor?

5 THE COURT: You may.

11:00:25

6 BY MR. KLEINDIENST:

7 Q. I'm handing you Exhibits 284 and 285. Do you recognize  
8 those documents?

9 A. 284 I do.

10 And I recognize 285 as a Certificate of Training, but  
11 I've never seen this particular one.

11:00:42

12 Q. Okay. 284, what is 284?

13 A. It's a class roster. Every day when the students come to  
14 class we have them initial the right column of this. It's an  
15 attendance roster.

11:01:00

16 Q. And does it indicate on there their performance on the  
17 judgment pistol shooting?

18 A. Yes. And it's either pass or fail.

19 Q. And who fills out that sheet?

20 A. I do.

11:01:13

21 Q. You do, based on -- as the instructor for the class?

22 A. Yes.

23 Q. Do you see Lonnie Swartz's name on that list?

24 A. Yes.

25 Q. And did he pass or fail the judgment pistol shooting

11:01:23

Allen Foraker - Direct Examination

1 course?

2 A. He passed.

3 Q. He passed.

4 Now, the other document --

5 I would move that into evidence, Your Honor, 284.

11:01:32

6 MR. CHAPMAN: No objection.

7 THE COURT: 284 can be admitted.

8 (Exhibit No. 284 admitted into evidence.)

9 BY MR. KLEINDIENST:

10 Q. 285 is the certificate; correct?

11:01:39

11 A. Yes.

12 Q. Do you recognize the type of certificate it is?

13 A. I recognize it's a training certificate.

14 Q. And what does it pertain to?

15 A. Recognition of successful completion of CBP Use of Force

11:01:48

16 Policy Training.

17 Q. Is that something that is issued to the students after

18 they've completed the use of force training?

19 A. I do not recognize this.

20 Q. Okay.

11:02:03

21 A. Unless there was some use of force training provided by CBP

22 elsewhere, I don't recognize this.

23 Q. Okay. Fair enough.

24 A. And this is a CBP issued. And the academy is OTD.

25 Q. OTD meaning?

11:02:20

~~Allen Foraker - Direct Examination~~

1 A. Office of Training and Development.

2 Q. Okay. So let's set that exhibit aside.

3 MR. KLEINDIENST: Your Honor, this might be a good  
4 time to take a break.

5 THE COURT: Let's take ten minutes. 11:02:31

6 (Recess at 11:02 a.m., until 11:15 a.m.)

7 THE COURT: Let the record show the jury has returned  
8 back to the courtroom, the presence of all counsel and the  
9 defendant.

10 You may continue, Mr. Kleindienst. 11:15:50

11 MR. KLEINDIENST: Thank you, Your Honor.

12 BY MR. KLEINDIENST:

13 Q. Let me just go back to Exhibit 284, which was the score  
14 sheet for the judgment pistol shooting, which you identified  
15 Lonnie Swartz as being one of the students. 11:16:03

16 What's the date of that score sheet? Just so we have  
17 an approximate date of when he came through the Academy.

18 A. November 3, 2010.

19 Q. Okay. Do you know how long after you go through the  
20 judgment pistol shooting and score it, are they towards the end 11:16:20  
21 of their tenure at the Academy?

22 A. No, this -- this is the second part of scoring for  
23 firearms, second to last part of scoring for firearms. I don't  
24 remember what part of their tenure that firearms ended.

25 Q. Okay. 11:16:45

~~Allen Foraker - Direct Examination~~

1 A. Firearms did not start their first week in the Academy. It  
2 took them two to three weeks before they got to firearms.

3 Q. Okay. And when the jury looks at 284 --

4 Well, I'll just put it on the ELMO.

5 This is Exhibit 284 being publish to the jury. Do you 11:17:22  
6 see your name up there anywhere? You can circle it with your  
7 finger. It's kind of a magic screen.

8 A. My name? Yes. (Indicating.)

9 Q. And that just indicates that you were -- well, what was  
10 your capacity? 11:17:40

11 A. That identified me as the class coordinator for this class.

12 Q. And the date of the score sheet?

13 A. Pardon me, sir?

14 Q. The date of the score sheet.

15 A. The date, 11-3-2010. 11:17:51

16 Q. And do you see Mr. Swartz's name on the list of students?

17 A. He's on line 22, which corresponds to his firing point.

18 Q. I'm sorry?

19 A. The students are assigned their position alphabetically for  
20 firing points 1 through 25. 11:18:12

21 Q. Okay. And then the initials on the other side of the page,  
22 under 22, whose initials would that be? Would that be one of  
23 the instructors?

24 A. These down at the bottom center?

25 Q. I'm thinking more of right here where -- right across from 11:18:33

Allen Foraker - Direct Examination

1 his name, if you go across to the other column.

2 A. These are the students' initials.

3 Q. Okay.

4 A. When they first come out on the range, the first thing they  
5 do is sign in. This is our attendance tracker. 11:18:47

6 Q. Okay. Thank you.

7 Now, do you spend any time with the students,  
8 including Mr. Swartz who was in your class, on what's called  
9 cover and concealment?

10 A. Yes. 11:19:19

11 Q. Can you discuss those concepts for the jury, please?

12 A. Yes. It's later in the firearms curriculum. We bring them  
13 out -- and, again, everything starts with a classroom  
14 PowerPoint presentation. The first day out is always two  
15 hours. And then the return day is going to be another two 11:19:38  
16 hours.

17 And the first hour of the first day is the PowerPoint  
18 presentation. And in cover and concealment what we cover in  
19 that PowerPoint is how to utilize available cover out in the  
20 field. 11:19:57

21 Q. Why do you teach that to them?

22 A. So that an agent doesn't feel that they're out there naked  
23 with no protection. There's different things that can be used  
24 for cover, and we try to show them what it is, how much little  
25 of something can be great cover. 11:20:16

—Allen Foraker - Direct Examination—

1 Q. And what's the purpose of taking cover?

2 A. So you don't get hurt.

3 Q. Does that mean that if you are standing out in the open and  
4 there's a threat to you and cover's available, what decision do  
5 you teach the students to make?

11:20:31

6 A. Use cover.

7 Q. To use cover?

8 A. Use cover.

9 Q. Do you teach them that if cover is available you can still  
10 stand your ground and not take cover and be exposed to the  
11 threat?

11:20:40

12 A. No.

13 MR. CHAPMAN: Object to the form of the question.

14 THE COURT: Overruled.

15 BY MR. KLEINDIENST:

11:20:48

16 Q. I'm sorry, your answer was no, they're not taught that?

17 A. My answer was no.

18 Q. Can you give the jury an idea of the types of cover that  
19 the students are taught are available to them at the Academy?

20 A. Yes. When we take them out of the classroom we put them  
21 out in a -- we still call it a range. It's not a firing range,  
22 but it's a paintball range. And on the end is an instructor  
23 with a paintball gun behind a sheet of plastic with a hole in  
24 it.

11:21:00

25 Out in the field, the covered field, the students

11:21:17

~~Allen Foraker - Direct Examination~~

1 enter through a gate in the center of the back wall. And the  
2 first thing that's available to them are two different types of  
3 vehicles. One being a pickup truck with a very large custodial  
4 box in the back, and that's a box that is used to secure the  
5 subjects when they're arrested. And then to the left of that,  
6 in front of the other vehicle -- in front of that pickup truck  
7 is a sedan.

11:21:43

8 We use both, because the students have no idea what  
9 they're going to be patrolling in that day, any particular day.  
10 So we give them an option and show them how to use different  
11 parts of that vehicle for cover, and how to return fire from a  
12 position of cover when fired upon.

11:22:03

13 Q. So vehicles are a source of cover for the agent if he's in  
14 a situation where he feels threatened with deadly force;  
15 correct?

11:22:26

16 A. Yes.

17 Q. Any other examples of cover that's available to an agent?

18 A. Yes. Once we move away from the vehicles, we show the  
19 students that a telephone pole makes a good cover position.

20 And beyond that a very low wall, which is only about  
21 18 inches in height, 12 to 18 inches. And we teach them how to  
22 lay behind that.

11:22:40

23 We teach them how to use the old style blue mail boxes  
24 that you used to see on street corners. A stack of tires is  
25 another part of cover. A barrel, just a round drum.

11:23:01

—Allen Foraker - Direct Examination—

1 Anything that you can put between you and the  
2 offending fire can be cover.

3 Q. And I take it that taking cover may mean that you might  
4 have to move from one source of cover to another based on a  
5 change in circumstance?

11:23:27

6 A. Yes. And we teach that in this range.

7 Q. How do you teach that?

8 A. After the students hit the Plexiglass sheet that the  
9 instructor is shooting from, they hit it twice, the instructor  
10 will give them -- the one firing the paintball gun, will give  
11 them three seconds to advance to another type of cover.

11:23:45

12 And they have to do it correctly, the way that they  
13 were taught. If they don't do it correctly they get hit with a  
14 paintball.

15 Q. Those are things like my son would use when he was in grade  
16 school?

11:24:02

17 A. Yes, the exact same thing.

18 Q. Okay. How about concealment, what's the purpose of  
19 concealment?

20 A. Concealment is the protection from enemy observation, the  
21 enemy being your suspect or your subject. That's concealment  
22 from observation.

11:24:15

23 Q. Can you give us an example?

24 A. A man hiding in the brush, he not necessarily has cover,  
25 but he would have concealment, because you cannot observe the

11:24:38

—Allen Foraker - Direct Examination—

1 person hiding in the brush.

2 Q. Okay. So concealment and cover can be interchangeable in  
3 any deadly force situation or potential deadly force situation?

4 It depends on where you are and what's available.

5 A. They can be intermixed. If you have cover, you definitely 11:24:59  
6 have concealment. If you have concealment, you don't  
7 necessarily have cover.

8 Q. Even though there's not a written policy for an agent to  
9 take cover when he's confronted with a threat, does that not  
10 mean that it's a sound tactical practice of moving to a safe 11:25:24  
11 position to avoid the threat?

12 MR. CHAPMAN: Objection, form and foundation.

13 THE COURT: Do you understand the question?

14 THE WITNESS: I understand the question.

15 THE COURT: Overruled. 11:25:33

16 THE WITNESS: It is a sound tactical movement to find  
17 cover.

18 The agent that does not find cover --

19 MR. CHAPMAN: Object to the narrative of the response.

20 THE COURT: Next question. 11:25:47

21 MR. KLEINDIENST: I will.

22 BY MR. KLEINDIENST:

23 Q. And the agent who does not seek cover, what happens?

24 MR. CHAPMAN: Objection --

25 THE WITNESS: You usually get shot or hurt. 11:25:53

~~Allen Foraker - Direct Examination~~

1 MR. CHAPMAN: Object to the form and foundation.

2 There's no factual specifics.

3 THE COURT: Sustained.

4 BY MR. KLEINDIENST:

5 Q. Do you teach that at the Academy, what happens when you  
6 don't take cover?

11:26:03

7 A. You can get hit with a rock. You can get shot. And in the  
8 cover course, if you're not using cover, you do get shot with a  
9 paintball gun.

10 Q. Is that -- is that decision not to use cover that's  
11 available, is that consistent with the agent -- the way the  
12 agents are taught at the Academy to remain safe on the job?

11:26:21

13 A. No.

14 MR. CHAPMAN: Objection to the form and foundation.  
15 The statement is made in a vacuum with no clarity about the  
16 circumstances.

11:26:37

17 THE COURT: The objection is overruled.

18 BY MR. KLEINDIENST:

19 Q. You can answer the question, please.

20 A. Can I have it again, please?

11:26:45

21 Q. Yeah. Is there a reason why they're taught not to stand  
22 their ground but to take cover?

23 A. Yes, there is a reason for that.

24 Q. What is that?

25 A. Survival.

11:26:57

—Allen Foraker - Direct Examination—

1 Q. Survival?

2 A. Survival.

3 Q. Now, if there is a legitimate law enforcement operation  
4 going on that the agent has to respond to, it may not be  
5 possible sometimes to take cover; correct?

11:27:08

6 A. Correct.

7 Q. But if there's no legitimate enforcement operation going on  
8 and you can take cover, that's how they're taught to operate?

9 A. Correct.

10 Q. Okay. And I may have covered this before, but are they  
11 trained that if they have to use some type of force, once the  
12 threat is stopped their use of force ceases?

11:27:19

13 A. It needs to deescalate.

14 Q. Or deescalate.

15 A. But not cease.

11:27:40

16 Q. By the way, Mr. Foraker, I forgot to ask you and I  
17 remembered at the break. You're now retired from Border  
18 Patrol?

19 A. Yes.

20 Q. And you've consulted with my office about this case;  
21 correct?

11:27:52

22 A. Yes.

23 Q. In fact, you've gone down to the scene where the shooting  
24 took place?

25 A. Yes.

11:28:01

~~Allen Foraker - Direct Examination~~

1 Q. And you've seen the videotape that was recorded of the  
2 shooting?

3 A. Yes.

4 Q. You're obviously doing this for monetary compensation?

5 A. Yes.

11:28:10

6 Q. And do you know roughly how much you're paid an hour, just  
7 so the jury knows?

8 A. Per hour?

9 Q. Per hour.

10 A. \$175 an hour.

11:28:16

11 Q. Okay. Going back to the jeopardy triangle, and let's talk  
12 about means.

13 You had means/ability, we have proximity or  
14 opportunity, and then we have intent on the three legs of the  
15 triangle. And we talked about rocking in specifics.

11:28:35

16 With respect to means and ability, does that  
17 have -- does the size of the rock have an impact on whether or  
18 not that part of the triangle is established?

19 A. Yes.

20 Q. How so?

11:28:52

21 A. A person with a baseball-sized rock in his hand as opposed  
22 to a person with a marble-sized rock in his hand, present two  
23 different -- two different issues. It's not likely that a  
24 person holding a marble in his hand can throw that hard enough  
25 to cause grievous bodily harm. Whereas a baseball-size rock,

11:29:17

Allen Foraker - Direct Examination

1 it most definitely has the possibility of causing grievous  
2 bodily harm.

3 Q. So not every rock is the same.

4 A. No, sir.

5 Q. And not every rocking is the same.

11:29:30

6 A. No, sir.

7 Q. And with respect to the opportunity part of the triangle,  
8 again in a rocking situation, does distance play a role in the  
9 threat to the officer?

10 A. Yes.

11:29:43

11 Q. And how so?

12 A. Because rock throwers are limited on their distance, how  
13 far they can throw that rock.

14 Q. And the farther -- what happens when the distance between  
15 the agent and the rock thrower is great as compared to close?

11:29:55

16 A. When it's great, the greater it is, the less proximity  
17 there is, and that part of the jeopardy triangle does not  
18 exist.

19 Q. Why not?

20 A. Because the proximity is not there.

11:30:12

21 Q. You mean if they're so far away?

22 A. They're so far away. The rock thrower would be incapable  
23 of making the rock go that far barehanded.

24 Q. What happens if they are at a distance and rocks are still  
25 falling near where the agents are at, do you still have

11:30:28

—Allen Foraker - Direct Examination—

1 proximity or opportunity?

2 A. You would have proximity. If the rocks are landing where  
3 the agents can hear them or see them, there is proximity.

4 Q. But in terms of whether or not they are able to cause  
5 serious grievous injury is another issue; right?

11:30:44

6 A. Yes, sir.

7 Q. And what factors play into that in that scenario?

8 A. The velocity of the rock.

9 Q. What do you mean?

10 A. The speed at which the rock is impacting its intended  
11 target.

11:30:56

12 Q. Do you have any experience in that?

13 A. Yes.

14 Q. What's that?

15 A. A lifetime of ballistic study and a whole career working on  
16 the border, watching rocks come over the fences, watching the  
17 damage that they do to the vehicles.

11:31:08

18 Q. And what is the fact where a rock gets thrown up in the air  
19 at a distance, how does velocity affect the dangerousness of  
20 that rock?

11:31:31

21 A. As the rock is in its upward travel, when it reaches its  
22 zenith --

23 MR. CHAPMAN: Objection. May I approach the bench?

24 (At sidebar on the record.)

25 MR. CHAPMAN: I guess we have a rocking expert now, an

11:31:52

~~Allen Foraker - Direct Examination~~

1 aeronautical engineer on the velocity of rocks and their size  
2 and shape. This is kind of ridiculous. And it hasn't been  
3 disclosed that he's going to offer some sort of expert  
4 testimony on this too.

5 I mean, this is all a matter of common sense. The 11:32:09  
6 jury doesn't need to hear that he thinks he's an expert on what  
7 rocks are and what rocks can cause harm or what can't cause  
8 harm.

9 MR. KLEINDIENST: Well, his testimony, based on his  
10 experience, which he just indicated that it was based on, is 11:32:22  
11 that, you know, rocks can lose their velocity and present less  
12 of a threat. I don't think it's about aeronautics, it's just  
13 about -- Mr. Chapman says common sense, but I think it's  
14 something beyond what the typical lay person would understand  
15 would happen -- 11:32:42

16 THE COURT: What's he going to say?

17 MR. KLEINDIENST: He's going to say that it loses its  
18 speed and its effectiveness.

19 THE COURT: From going up in the air and then coming  
20 down? 11:32:48

21 MR. KLEINDIENST: Because of gravity.

22 MR. CHAPMAN: Just for the record, I think it also  
23 opens the door for more information on the prevalence of  
24 rocking incidents and assaults.

25 THE COURT: You're going to ask him if he's been 11:32:59

—Allen Foraker - Direct Examination—

1     rocked before, aren't you?

2             MR. CHAPMAN: I'd like to know if he's familiar with  
3     the statistics. Because the suggestion is there are no  
4     injuries, this wasn't a dangerous situation.

5             MR. KLEINDIENST: He hasn't suggested that. And we  
6     haven't asked him those questions.

7             MR. CHAPMAN: You haven't asked him that, but that's  
8     what you want the jury to think.

9             I'll ask what I think I can on direct.

10            THE COURT: Okay. Objection is overruled.

11            (End of discussion at sidebar.)

12            THE COURT: You may continue.

13            MR. KLEINDIENST: What was the last question?

14            THE COURT: It had to do with the apex of a rock.

15     BY MR. KLEINDIENST:

16     Q. The apex of a rock.

17     A. As a rock is thrown in the air, it's fighting gravity  
18     directly. Gravity is going down, the rock is trying to go up.  
19     There's a point where gravity overcomes the energy imparted in  
20     that rock. This is more so the steeper the rock is thrown up.  
21     As the rock is thrown flat, gravity still has an effect down,  
22     but the flat trajectory of the rock will carry farther and  
23     carry more energy. But if it's going up, gravity is pushing  
24     down on it and decimating the energy contained in the rock.

25            As it reaches its zenith or its apex, the only thing

—Allen Foraker - Direct Examination—

1 affecting that now is gravity. So --

2 Q. And not the velocity that --

3 A. Not the energy -- not the energy that was stored in it from  
4 the throw. It's run out of energy.

5 Momentum can still move the rock slightly away, but 11:34:39  
6 gravity takes over now and pushes that rock down, and it has a  
7 velocity or an acceleration factor.

8 Q. And what's that factor?

9 A. Acceleration in a vacuum is 32 feet per second, per second.

10 Q. So if the apex of the rock -- let's say the apex of the 11:35:07  
11 rock was 25 feet before it started to descend, how would  
12 that -- how would you examine that?

13 A. If the rock were aerodynamic, it would reach its  
14 acceleration speed --

15 MR. CHAPMAN: Judge, I object. 11:35:31

16 THE WITNESS: -- faster than --

17 THE COURT: Just a second, just a second.

18 (At sidebar on the record.)

19 THE COURT: I wasn't expecting 32 feet per second, per  
20 second. I wasn't expecting that. Were you? 11:35:51

21 MR. KLEINDIENST: Uh-huh.

22 THE COURT: Why? How does he know that?

23 MR. KLEINDIENST: He just knows it from his  
24 experiences.

25 THE COURT: How does he know it's 32 feet per second, 11:35:59

~~Allen Foraker - Direct Examination~~

1 per second?

2 MR. CALLE: In a vacuum.

3 THE COURT: In a vacuum.

4 MR. CHAPMAN: When was this testimony disclosed to me,  
5 other than ten seconds ago? 11:36:08

6 THE COURT: I think we're moving way far afield, way  
7 far afield.

8 MR. KLEINDIENST: Okay.

9 THE COURT: Let's leave the speed alone at this point.

10 MR. KLEINDIENST: We'll leave the speed alone. 11:36:16

11 THE COURT: All right.

12 (End of discussion at sidebar.)

13 (Discussion off the record between Government counsel.)

14 BY MR. KLEINDIENST:

15 Q. We won't get into aeronautics -- 11:36:50

16 THE COURT: Aerodynamics.

17 MR. KLEINDIENST: Aerodynamics. Thank you,  
18 Your Honor.

19 BY MR. KLEINDIENST:

20 Q. But gravity does play a part in terms of the amount of  
21 energy the rock has by the time it lands on the ground? 11:36:58

22 A. Nothing but gravity at this point.

23 Q. Nothing but gravity at this point.

24 Going back just a bit, and I apologize. Is there an  
25 obligation by an agent when he's in the field and he's 11:37:13

Allen Foraker - Direct Examination

1 confronted with a threat to make assessments of that threat?

2 A. Yes.

3 Q. And is that an assessment that is just made once, or what's  
4 he trained to do as the scenario plays out?

5 A. Continually assess the threat.

11:37:30

6 Q. Can you give us an example of that?

7 A. A threat can escalate or a threat can deescalate. And it's  
8 entirely on the obligation of the suspect -- or the subject, on  
9 whether that threat escalates or deescalates.

10 Q. You mean it's on the agent to make a determination or an  
11 assessment?

11:37:47

12 A. The agent is assessing what the subject is doing on a  
13 continual basis.

14 Q. From beginning to end?

15 A. Beginning to end.

11:37:59

16 Q. Always to make an assessment?

17 A. Always.

18 Q. And then you would make -- you might make a different  
19 decision based on the assessment you made during this scenario;  
20 is that correct?

11:38:12

21 A. Yes.

22 Q. Is that something that's trained and taught at the Academy?

23 A. It's touched on, but that's one of the things that they  
24 learn when they get out in the field.

25 Q. Is that what you learned when you got out in the field

11:38:22

—Allen Foraker - Direct Examination—

1 yourself?

2 A. It's been so long I don't remember.

3 Q. But it's a concept that you're familiar with?

4 A. Yes.

5 Q. And it's a concept that agents are familiar with who work  
6 in the Border Patrol about assessing the situation?

11:38:30

7 A. Yes.

8 Q. By the way, looking at the videotape, did you find any  
9 evidence of cover that was available to the individuals on the  
10 night of October 10th, 2012?

11:38:49

11 A. Yes.

12 MR. CHAPMAN: Objection.

13 THE COURT: Overruled.

14 BY MR. KLEINDIENST:

15 Q. And in your experience and in your expertise, what cover  
16 did you see?

11:38:56

17 A. Vehicles.

18 Q. Which vehicles?

19 A. The Nogales police cruiser, the Border Patrol truck that  
20 was parked in the middle of the street, were two.

11:39:10

21 Q. Any other areas of cover?

22 A. Just outside, which would increase the distance away from  
23 the street, there was a building, there was a tree.

24 Q. Okay.

25 A. There was other cover.

11:39:27

—Allen Foraker - Direct Examination—

1 Q. Was there an opportunity for the agents to -- were they  
2 caught in a situation where there was no point of escape?

3 A. No.

4 MR. CHAPMAN: Objection to the form of the question.

5 THE COURT: Overruled.

11:39:40

6 BY MR. KLEINDIENST:

7 Q. There was an ability to escape?

8 A. Yes.

9 Q. And how so?

10 A. The area to the north of the agents was not congested, it  
11 was wide open. There were no threats. There was clear, open,  
12 safe space to move to the north.

11:39:47

13 Q. Just to avoid the threat?

14 A. Just to avoid the threat.

15 Q. And that's something that's taught at the Academy?

11:40:01

16 A. It is taught, necessary.

17 Q. Finally, let me ask you this: Is lethal force by an agent  
18 justified to kill somebody because they injured in this case a  
19 canine dog?

20 A. No.

11:40:21

21 Q. No?

22 A. No.

23 Q. And why is that?

24 A. According to CBP policy, you can only use deadly force in  
25 the defense of yourself or another person.

11:40:33

~~Allen Foraker - Direct Examination~~

1 Q. So even though a canine who is a part of the operation  
2 might be in danger, that does not justify under the law the use  
3 of lethal force?

4 A. No, sir, it does not.

5 MR. KLEINDIENST: That's all the questions I have. 11:40:49  
6 Thank you.

7 MR. CHAPMAN: Your Honor, can I approach?

8 (At sidebar on the record.)

9 MR. CHAPMAN: Would it be possible to break for lunch  
10 now so I can get my stuff set up? 11:41:20

11 THE COURT: We can. But I have a lunch meeting that I  
12 probably won't be able to get back until 1:30. But that's okay  
13 with me.

14 MR. CHAPMAN: That's fine with me.

15 THE COURT: How long do you think you're going to be? 11:41:32

16 MR. CHAPMAN: I don't think it's going to be more than  
17 a half hour, but I'm not sure.

18 MS. FELDMEIER: Okay.

19 THE COURT: I don't want you to rush. Take your time.

20 MR. CHAPMAN: Okay. 11:41:39

21 MR. KLEINDIENST: So we're taking a recess?

22 THE COURT: We're going to take a recess, we're going  
23 to take our break.

24 MR. CALLE: Until 1:30, Your Honor?

25 THE COURT: Yes. 11:41:44

~~Allen Foraker - Cross-Examination~~

1 (End of discussion at sidebar.)

2 THE COURT: Rather than interrupt Mr. Chapman's  
3 cross-examination, we'll go ahead and take our lunch recess at  
4 this point in time.

5 And because I have a lunch meeting, we won't start 11:42:10  
6 back until 1:30.

7 So remember the admonitions I've given you before.  
8 We'll be starting on time at 1:30.

9 Remember the admonitions. No news, no talking, no  
10 thinking about it. 11:42:24

11 (Recess at 11:42 a.m., until 1:29 p.m.)

12 THE COURT: Let the record show the jury's returned  
13 back to the courtroom, the presence of all counsel and  
14 defendant.

15 Mr. Chapman, you may proceed whenever you're ready. 13:29:34

16 MR. CHAPMAN: Thank you, Judge.

17 CROSS-EXAMINATION

18 BY MR. CHAPMAN:

19 Q. Good afternoon, Mr. Foraker.

20 Do you have the microphone up there? 13:29:42

21 A. How's this?

22 Q. That's great.

23 All right. I'm going to ask you a couple background  
24 questions.

25 Did you ever work at the Nogales Station? 13:29:52

~~Allen Foraker - Cross-Examination~~

1 A. No, sir.

2 Q. So you never worked the international boundary line, either  
3 east or west of the DeConcini Port of Entry?

4 A. No, sir.

5 Q. Do you know -- you don't know what the 410 location is or  
6 what it involves in terms of smuggling activity?

13:30:06

7 A. No, sir.

8 Q. And you don't know what the Blind Center is or what that  
9 involves either, do you?

10 A. No, sir.

13:30:19

11 Q. I'm going to ask you some questions about your discussion  
12 of policy earlier. I want to see if --

13 I'm not sure if that's being displayed to the jury.

14 THE COURT: It's not.

15 BY MR. CHAPMAN:

13:30:42

16 Q. I want to see if you can just agree with me on certain  
17 concepts. Okay?

18 A. Yes, sir.

19 Q. First of all, agents can use deadly force when they have a  
20 reasonable belief that the subject of such force poses an  
21 imminent danger of death or serious physical injury.

13:30:52

22 A. I agree.

23 Q. And that can be not just to the agent in particular, but it  
24 can also be to a third person; correct?

25 A. Yes, sir.

13:31:08

~~Allen Foraker - Cross-Examination~~

1 Q. So if you're out in the field with your fellow agents, or  
2 maybe you have an arrestee in custody, this policy affords you  
3 the opportunity to use deadly force to protect those  
4 individuals as well --

5 A. Yes, sir.

13:31:24

6 Q. -- is that right?

7 And when -- and I think this is important. I want to  
8 make sure I understand your testimony. When deadly force is  
9 justified, an agent may use any level of force necessary up to  
10 and including deadly force; correct?

13:31:40

11 A. That is correct.

12 Q. So if you envision a scenario where someone is getting  
13 attacked, an agent is getting attacked, and the agent has  
14 lethal force in the form of his handgun, but he may also have  
15 less lethal device like pepper spray or a PLS launcher,  
16 something like that, it's within his discretion what force he  
17 employs under the circumstances.

13:31:59

18 A. Yes, sir.

19 Q. Because I want to make clear, you're not here to testify  
20 that when agents are under assault by rocks they have to in all  
21 circumstances take cover. That's not your testimony, is it?

13:32:18

22 It depends on the circumstances.

23 A. That's not my testimony.

24 Q. You agree with me?

25 A. They should attempt cover.

13:32:35

~~Allen Foraker - Cross-Examination~~

1 Q. But there may be situations where that is not reasonable.

2 A. Yes, sir.

3 Q. Let me give you an example.

4 A. Yes, sir.

5 Q. Okay. Defending a third person, and the agent reasonably  
6 believes that it's necessary to use deadly force to defend that  
7 third person.

13:32:44

8 A. Yes, sir. Agree.

9 Q. And the other thing that I think it's important for us to  
10 think about, and what you testified about, is that the  
11 reasonableness of the agent's action can't be viewed from the  
12 calmness of a courtroom like this, in hindsight, it has to be  
13 viewed in the context that the agent is being forced to make a  
14 split-second decision; right?

13:33:03

15 A. Yes.

13:33:28

16 Q. And that the circumstances when deadly force are -- is  
17 applied are frequently tense, unpredictable and rapidly  
18 evolving.

19 A. That is correct.

20 Q. And you could have a situation -- you're not also  
21 testifying -- let me -- that's a horrible question.

13:33:43

22 You're not saying either that agents in the same event  
23 may see -- be looking or hearing or seeing something different  
24 and they act differently in response to the threat, are you?

25 That's a reasonable possibility.

13:34:06

~~Allen Foraker - Cross-Examination~~

1 A. That would be that agent's observation.

2 Q. Right. What I'm trying to get at is, if two agents are out  
3 in the field, one may hear rocks landing around him and one may  
4 not.

5 A. Yes, sir. 13:34:20

6 Q. So they may react differently.

7 A. That is correct.

8 Q. One may be close to cover and one may be not --

9 A. That is correct.

10 Q. -- right? 13:34:27

11 The bottom line is, is that the decision to shoot  
12 someone takes place in the blink of an eye.

13 A. Yes, sir.

14 Q. And when we're asked to think about that decision, what we  
15 have to factor in is that we're not in a courtroom, protected 13:34:57  
16 by security, in front of a judge, prosecutors, defense  
17 attorneys, that agent may be out there in the middle of the  
18 night perceiving a threat, trying to figure out if he or  
19 someone else is about to get seriously injured or killed, and  
20 he may -- has to make a decision like that. 13:35:23

21 A. That's right. He might have to, yes, sir.

22 Q. And that's what you train for.

23 A. Yes, it is.

24 Q. And you agree with me that rocks can be considered  
25 dangerous weapons under the right circumstances. 13:35:38

~~Allen Foraker - Cross-Examination~~

1 A. Yes, sir.

2 Q. One of the things that you talked to people -- these agents  
3 that you're training about, or you did, was that these events  
4 are so stressful, whether it's getting rocked or shot at or  
5 whatever, that the stress can actually impact their gross motor 13:35:57  
6 skills.

7 A. Yes. And that is taught at the Academy.

8 Q. And what I mean by that is, they can lose a sense of where  
9 they're at?

10 A. Yes. 13:36:15

11 Q. They may not be as coordinated?

12 A. Correct.

13 Q. Because of the adrenaline coursing through their body.

14 Their heart rates get too high.

15 A. Correct. 13:36:31

16 Q. You got to talk to them about, hey, this is scary, but what  
17 I want you to think about if you're ever in this situation is,  
18 get your heart rate down, understand that your body is reacting  
19 to the threat; right?

20 A. Correct. 13:36:44

21 Q. And they can even get tunnel vision; right?

22 A. Absolutely.

23 Q. Where they're actually focusing on something, the threat,  
24 to the exclusion of everything else around them.

25 A. Correct. 13:36:57

~~Allen Foraker - Cross-Examination~~

1 Q. Once they decide to make that decision to employ deadly  
2 force and use their weapon, they may not even hear their  
3 firearm go off when they fire it.

4 A. Agreed.

5 Q. And they may only see the target; correct?

13:37:11

6 A. Agreed.

7 Q. And the whole thing may seem like it took an eternity to  
8 them, but it may have only took five or ten seconds. Is that  
9 true?

10 A. Yes, sir.

13:37:24

11 Q. And that's because these events are so stressful and so  
12 scary that it impacts the mind in incredibly powerful ways.  
13 True?

14 A. Yes, sir.

15 Q. And I'm sure in your experience you've even -- would agree  
16 that sometimes memories -- memories of the shooting event are  
17 impaired.

13:37:35

18 A. Memories are.

19 Q. Exactly what happened, or the sequence, that type of thing  
20 is impaired.

13:37:51

21 A. After a shooting the officer is given 72 hours to go and  
22 relax, get away from the office, whatever it is that makes them  
23 relax. And so they can calm down and try to recollect what has  
24 happened in the past 72 hours.

25 Q. I mean the job of the Border Patrol is not like what most

13:38:11

~~Allen Foraker - Cross-Examination~~

1 people do.

2 A. No, sir, it's not.

3 Q. One of the things that's unique about it is that, unlike a  
4 lot of other agencies, Border Patrol agents will actually go  
5 out in the field by themselves and attempt to apprehend 20, 30  
6 people.

13:38:26

7 A. That is correct.

8 Q. And there's a reason why they wear a handgun; isn't that  
9 true?

10 A. That's correct.

13:38:40

11 Q. It's because their job is dangerous.

12 A. That is correct.

13 Q. And they're trained because they're expected to make  
14 split-second life-and-death decisions.

15 A. I agree.

13:38:53

16 Q. You can have a month of boredom, and then the next thing  
17 you know, boom --

18 A. I agree.

19 Q. -- you have to react, react right now.

20 A. Yes, sir.

13:39:01

21 Q. And if you make the wrong reaction, maybe somebody dies.

22 A. Absolutely, sir.

23 Q. You die, a fellow agent dies; right?

24 A. Correct.

25 Q. This is a dangerous business that these guys are in.

13:39:11

~~Allen Foraker - Cross-Examination~~

1 A. Yes, sir, it is.

2 Q. There was no training about shooting across the border into  
3 Mexico, was there?

4 A. No, sir.

5 Q. That was never addressed?

13:39:26

6 A. No, sir.

7 Q. But we can agree that you don't have to take an assault  
8 just because it's coming from Mexico; true?

9 A. You don't have to take an assault at all, sir.

10 Depend -- and the location of the assault doesn't matter, if  
11 it's an assault and a viable alternative does not exist.

13:39:45

12 Q. Well, agents are not trained to fire warning shots at  
13 people; right?

14 A. They are forbidden.

15 Q. In fact, they're trained basically if they're going to use  
16 deadly force they're going to fire at center mass; right?

13:40:07

17 A. Yes, sir.

18 Q. Can you tell the jury what that means?

19 A. Yes, sir. Center mass is the middle of the available mass  
20 of the target you intend to shoot. If it's a human being, from  
21 the waist up, between the shoulder, center mass would be right  
22 in the middle of the chest.

13:40:20

23 Q. And they're also trained not to shoot warning shots; right?

24 A. Correct.

25 Q. If they make the decision to shoot, they're essentially

13:40:39

~~Allen Foraker - Redirect Examination~~

1 employing deadly force.

2 A. They are employing deadly force.

3 Q. It's not like in the movies where the movie star shoots  
4 somebody in the arm just to wing them?

5 A. No, sir.

13:40:54

6 Q. In fact, they're told they can't do that; right?

7 A. We are told -- I tell them, everybody, you cannot do that.

8 Q. It sounds like what you're saying is that any rocking  
9 event, number one, could turn into a deadly force incident.

10 A. Could; correct.

13:41:20

11 Q. And two, each one has to be looked at on a case-by-case  
12 basis.

13 A. Yes, sir.

14 Q. And then finally, we don't look at these events from -- we  
15 have to try to put ourselves in the shoes of the agent and  
16 understand, when assessing whether they're acting reasonably or  
17 not, that these are split-second decisions based on the  
18 environment that existed at the time.

13:41:36

19 A. Yes, sir.

20 (Discussion off the record between defense counsel.)

13:41:59

21 MR. CHAPMAN: No further questions.

22 THE COURT: Mr. Kleindienst.

23 REDIRECT EXAMINATION

24 BY MR. KLEINDIENST:

25 Q. Mr. Foraker, it is true that sometimes agents have to make

13:42:11

—Allen Foraker - Redirect Examination—

1 split-second decisions to fire or not fire; correct?

2 A. It is correct.

3 Q. But that doesn't mean that every time an officer fires it's  
4 a split-second decision.

5 A. That is correct.

13:42:25

6 Q. There are instances when the agent has ample time to assess  
7 the situation and make a decision to fire that doesn't call for  
8 a split-second decision.

9 A. That is correct.

10 Q. So when Mr. Chapman asked you about agents have to make  
11 split-second decisions, that's not true in every case.

13:42:37

12 A. Not every case.

13 Q. And, in fact, you would agree with me that if an agent had  
14 the time it took to walk across the street, at a walk and not  
15 at a run, and the street was about 30 feet wide, that that  
16 wouldn't be a split-second decision.

13:42:54

17 A. I would agree.

18 Q. You would agree; right?

19 A. I would agree.

20 Q. There would be ample time there for him to make an  
21 assessment.

13:43:06

22 A. Yes, sir.

23 Q. Okay. The reason why agents are required to make decisions  
24 about whether or not to use lethal force is why they're trained  
25 at the Academy; correct?

13:43:24

~~Allen Foraker - Redirect Examination~~

1 A. Correct.

2 Q. And even though their jobs may be dangerous, the purpose of  
3 the Academy is to educate them enough so that when they're  
4 placed in the situation they make the right decisions.

5 A. Correct.

13:43:41

6 Q. You don't want them to make the wrong decisions.

7 A. I didn't hear you, sir.

8 Q. Well, you don't want an agent to wrongfully shoot an  
9 individual when that was the wrong decision to make.

10 A. Correct.

13:43:53

11 Q. And even though you don't look at what the officer did in  
12 hindsight, in terms of whether or not what he did was  
13 reasonable, you still look at all the circumstances that  
14 surrounded the agent when he made the decision to fire his gun;  
15 correct?

13:44:11

16 A. Correct.

17 Q. And the one concept that Mr. Chapman left out was, other  
18 than reasonableness, is that before you can use lethal force it  
19 must be necessary; correct?

20 A. Correct.

13:44:22

21 Q. And that means it must be the last option available before  
22 you take a human life.

23 A. Correct.

24 Q. Because we value the integrity and sanctity of the human  
25 life, don't we --

13:44:32

~~Allen Foraker - Redirect Examination~~

1 A. Correct.

2 Q. -- in this society?

3 A. Correct.

4 Q. Okay. Now, you talked about the agents, when they're in a  
5 stressful situation they might get tunnel vision, they may have  
6 memory gaps, it may seem like an eternity. Those are all  
7 phenomena that you're familiar with; correct?

13:44:42

8 A. Yes, sir.

9 Q. But that doesn't happen to every agent.

10 A. No, sir.

13:45:01

11 Q. And is every situation different?

12 A. Yes.

13 Q. Okay. So those are typical phenomena that agents involved  
14 in shootings have experienced, that doesn't mean that they take  
15 place in every shooting.

13:45:12

16 A. Correct.

17 Q. Okay. Okay. I just wanted to make sure we're clear on  
18 that.

19 Now, when an agent comes to the Border Patrol Academy,  
20 is it made clear to him that the job, typically along the  
21 southwestern border, can be dangerous?

13:45:26

22 A. Yes, it is.

23 Q. Is it made clear to him that sometimes you get things  
24 thrown at you over the fence or through the fence along the  
25 border?

13:45:39

~~Allen Foraker - Redirect Examination~~

1 A. Yes, it is.

2 Q. Is that something that's impressed upon them as one of the  
3 risks of the job?

4 A. Yes, it is.

5 Q. Now, they're not -- no one's forcing them to become a  
6 Border Patrol Agent, are they?

13:45:46

7 A. They're not what, sir?

8 Q. I mean, no one's forcing somebody to become an agent.

9 A. No, sir, it is not a draft.

10 Q. So when they're told that the job that they are going to  
11 undertake if they graduate has an element of dangerousness into  
12 it, they know that going into it.

13:45:56

13 A. Yes, they do.

14 Q. And the whole purpose of the Academy is to train them to  
15 make the right response and make the right decision when  
16 there's a dangerous situation.

13:46:10

17 A. Yes, sir, it is.

18 Q. But they're given a heads up, a forewarning of what might  
19 happen along the southwest border.

20 A. Yes, sir.

13:46:23

21 Q. Finally, agents are trained to shoot, I think Mr. Chapman  
22 said, at critical mass; is that correct?

23 A. Center of mass.

24 Q. And can you tell me what center of mass is again?

25 A. Center of mass is the center of the available target. If a

13:46:42

~~Allen Foraker - Redirect Examination~~

1 human being is your target, the center between the points of  
2 the shoulders and the waist is in the middle of the chest.  
3 That would be center of mass.

4 Q. You're talking about the front of a human body?

5 A. Yes, sir.

13:47:01

6 Q. That's center mass.

7 A. Yes.

8 Q. Now, if we have an example where somebody doesn't have a  
9 threatening weapon, and his back is to the shooter, if the  
10 shooter shoots at his back is he shooting at center mass?

13:47:15

11 A. That can be center mass. It doesn't have to be the chest.

12 Q. But if it's not justified is it center of mass?

13 Can he shoot in the back --

14 A. I see no intent.

15 Q. Right. If there is no intent, he has no weapon in his  
16 hand, if somebody shoots him in the back six times, has he shot  
17 him in center mass?

13:47:29

18 A. There is no intent, there's no opportunity.

19 Q. Is that center mass?

20 A. That is center mass.

13:47:44

21 Q. But when there's no intent, it's not the center of mass  
22 that --

23 A. Well, that doesn't change. Center mass is always center  
24 mass. We always train the officers to shoot to the middle of  
25 the mass.

13:47:56

~~Allen Foraker - Redirect Examination~~

1 Q. Right.

2 A. Which reduces the risk of a miss or a ricochet into  
3 innocent bystanders.

4 Q. And my question to you is, if the person doesn't have the  
5 intent anymore to do any harm, is that an appropriate center  
6 mass to shoot at, his back?

13:48:06

7 A. Yes.

8 Q. It is?

9 A. Well, if it's not appropriate, it's not a shot, he should  
10 not have shot anyway.

13:48:16

11 Q. Okay. That's my question.

12 A. Okay.

13 Q. Is that right? That's all I'm asking.

14 If he has his back turned to the shooter and he no  
15 longer has a deadly weapon and he shoots him in the back,  
16 they're not trained to shoot them?

13:48:25

17 A. That is an unjustified shooting.

18 MR. KLEINDIENST: Okay.

19 THE COURT: Jurors have any questions, please place  
20 them in writing.

13:48:38

21 (At sidebar on the record.)

22 MR. CHAPMAN: Judge, I'm going to move for a mistrial.  
23 If you want me to make the record on it now.

24 THE COURT: Yeah, why don't you, while we're waiting  
25 for the jurors.

13:49:06

~~CR-15-1723-TUC-RCC - April 2, 2018~~

1 MR. CHAPMAN: First of all, they established him as an  
2 expert on rocks somehow without ever disclosing it, and I made  
3 my objection on that.

4 The second thing is, what they've done over and over  
5 again is they've elicited this claim that you can only employ 13:49:17  
6 deadly force as a last resort. And that's simply false. And  
7 it's not in comport -- it's not in conformance with the law.  
8 And they're creating a very misleading presentation of what use  
9 of force policy actually is.

10 I'd move for a mistrial based on that. 13:49:37

11 And I'd also move that you order them not to make that  
12 argument anymore. It's simply false.

13 The law is, is that you have a myriad of options, one  
14 of them is to take cover. And deadly force isn't always the  
15 option that's employed as a last resort. What they're trying 13:49:55  
16 to do is give the jury the misimpression that that is true and  
17 it's not.

18 So I move for a mistrial.

19 THE COURT: I think that the jurors have been very  
20 attentive of what's been going on. I think they've found that 13:50:08  
21 there's a full range of possible options available. And I  
22 think even this witness has made that clear.

23 MR. CHAPMAN: But, Judge, I think that -- I don't  
24 think, I know that the statement that deadly force should only  
25 be employed as a last resort is simply false. And the 13:50:23

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1 Government --

2 MR. KLEINDIENST: The part --

3 MR. CHAPMAN: I'm not done yet.

4 The Government knows that too. And it is incredibly  
5 prejudicial and misleading to continue to present that theme to 13:50:31  
6 the jury.

7 MR. KLEINDIENST: Well, that was part of his  
8 PowerPoint presentation at the Academy was that it had to be  
9 both reasonable under the circumstances and necessary. And  
10 necessary to these students was defined as last resort. That 13:50:45  
11 was his testimony.

12 MR. CHAPMAN: That's not true. That's not legally  
13 correct.

14 THE COURT: I think --

15 MR. CHAPMAN: It doesn't say that. The use of force 13:50:57  
16 policy never says that.

17 MR. KLEINDIENST: You can say whatever you want and  
18 you can have somebody else testify, but that's what the record  
19 is according to this agent.

20 MR. CHAPMAN: I'm saying this is a false statement of 13:51:07  
21 the law. And it's incredibly prejudicial and misleading. I  
22 don't think you should continue to allow this.

23 THE COURT: All right. Objection is overruled for  
24 this point.

25 Here are the questions: 13:51:19

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1 Is the Use of Force Handbook a copy of the actual law,  
2 an excerpt of the law, or an interpretation of the law?

3 Why is the PowerPoint presentation dated 10-16-2013 if  
4 it predates 2003?

5 MR. CHAPMAN: Can I address that first one?

13:51:38

6 I was thinking about that over the lunch hour, is that  
7 the Use of Force Handbook really is kind of an instruction on  
8 the law, which may deviate from the instructions you give under  
9 *Graham versus Connor* on the appropriate use of force and the  
10 application of self-defense.

13:51:56

11 And I want to supplement my objection to the admission  
12 of that Handbook for that reason as well, because I think when  
13 they get it back they may be looking at this and going, well,  
14 how does it square with the Judge's jury instructions?

15 THE COURT: All right.

13:52:12

16 How much training time is spent on nighttime and low  
17 light shooting situations?

18 Have you ever discharged your weapon in the line of  
19 duty or been present when another agent has?

20 Are the students given a test on the contents of the  
21 Handbook?

13:52:45

22 MR. KLEINDIENST: We would object to that other  
23 question, Judge, as to whether or not he ever fired his weapon  
24 or he was with an agent who fired a weapon.

25 THE COURT: No, it gives the jurors some sort of

13:52:57

~~Allen Foraker - Jury Questions~~

1 context as to how his training and experience fits into what  
2 he's teaching.

3 Can you tell if Mr. Swartz passed the judgment pistol  
4 shooting the first time or was it taken and passed the second  
5 time? 13:53:17

6 MR. CHAPMAN: That's fine. I think he passed the  
7 first time.

8 He probably won't remember.

9 THE COURT: Was a written test given over the Use of  
10 Force Handbook material? Why or why not? 13:53:29

11 Why did the jury see a PowerPoint from October 16, '13  
12 versus a PowerPoint from 11-3-10?

13 MR. KLEINDIENST: There's an answer to that.

14 THE COURT: Okay. Did the simulations offer use of  
15 nonlethal weapons as well as pistol use, or was it just shoot  
16 versus cover or retreat? 13:53:56

17 MR. CHAPMAN: That's a good question.

18 MR. KLEINDIENST: What was the question?

19 THE COURT: Did the simulations offer use of nonlethal  
20 weapons as well as pistol use, or was it just shoot versus  
21 cover or retreat? 13:54:07

22 (End of discussion at sidebar.)

23 THE COURT: I have several questions from the jury  
24 that I'm going to ask on their behalf.

25 Is the Use of Force Handbook a copy of the actual law, 13:54:39

~~Allen Foraker - Jury Questions~~

1 an excerpt of the law, or an interpretation of the law?

2 THE WITNESS: Excerpts of the law.

3 THE COURT: Why is a PowerPoint presentation dated  
4 October 16, 2013, if it predates 2003?

5 THE WITNESS: That PowerPoint on the thumb drive that  
6 it was on, part of the programming was it defaults to the last  
7 date it was opened. And we opened that on October 16th,  
8 2013 -- 2013.

13:55:01

9 THE COURT: How much training time is spent on  
10 nighttime and low light shooting situations?

13:55:19

11 THE WITNESS: At the Academy there's only two -- four  
12 hours of nighttime shooting. And once they get out into the  
13 field, they have to qualify quarterly at nighttime. That means  
14 once every three months they have to show up at night to do a  
15 nighttime qualification.

13:55:44

16 THE COURT: Have you ever discharged your weapon in  
17 the line of duty or been present when another agent has?

18 THE WITNESS: No, sir.

19 THE COURT: Are the students given a test on the  
20 contents of the Handbook?

13:55:58

21 THE WITNESS: No, sir.

22 THE COURT: Can you tell us if Mr. Swartz passed the  
23 judgment pistol shooting the first time it was taken or the  
24 second time?

25 THE WITNESS: The first time.

13:56:11

~~Allen Foraker - Jury Questions~~

1 THE COURT: Was there a written test given over the  
2 Use of Force Handbook material?

3 THE WITNESS: Yes, there was.

4 MR. KLEINDIENST: I'm sorry, Judge, what was the  
5 question?

13:56:33

6 THE COURT: Was a written test given over the Use of  
7 Force Handbook material?

8 THE WITNESS: I'm sorry, it's not the Handbook  
9 material. There is a written test at the conclusion of the  
10 PowerPoint program in the classroom. That's when a written  
11 test is given to them.

13:56:45

12 THE COURT: Did the simulations offer use of nonlethal  
13 weapons as well as pistol use, or was it just shoot versus  
14 cover retreat?

15 THE WITNESS: I don't understand that one, sir.

13:57:01

16 THE COURT: Let me -- did the simulations offer use of  
17 nonlethal weapons as well as pistol use, or was it just shoot  
18 versus cover retreat?

19 THE WITNESS: Shoot versus cover and retreat. Shoot,  
20 don't shoot, is exactly how those simulations were designed.

13:57:17

21 THE COURT: All right. Mr. Kleindienst, any questions  
22 based on the jurors' questions?

23 MR. KLEINDIENST: Yeah, I have a couple, Judge.

24 I think that last question dealt with nonlethal force;  
25 is that correct? Was that the last question?

~~Allen Foraker - Redirect Examination~~

1 THE COURT: Yes.

2 THE WITNESS: In the simulation.

3 REDIRECT EXAMINATION

4 BY MR. KLEINDIENST:

5 Q. Is there a separate course on non -- the use of nonlethal  
6 force?

13:57:38

7 A. It's not at firearms.

8 Q. It's not at firearms?

9 A. No.

10 Q. So you don't teach that?

13:57:45

11 A. No.

12 Q. And it wasn't taught when Mr. Swartz was there at the  
13 Academy?

14 A. Not by firearms.

15 Q. Not by firearms, it's taught by a different division of the  
16 Academy?

13:57:52

17 A. Yes, physical training department.

18 Q. On the day the PowerPoint --

19 MR. KLEINDIENST: May I approach the witness,  
20 Your Honor?

13:58:04

21 THE COURT: You may.

22 BY MR. KLEINDIENST:

23 Q. I'm showing you Exhibit 283, just for an example.

24 There is a date on the bottom of the second page which  
25 is the first slide; right?

13:58:17

~~Allen Foraker - Redirect Examination~~

1 A. Yes.

2 Q. And what's that date?

3 A. October 16th, 2013.

4 MR. KLEINDIENST: May I approach the witness again,  
5 Your Honor?

13:58:25

6 THE COURT: You may.

7 BY MR. KLEINDIENST:

8 Q. Do you remember, Mr. Foraker, appearing before the Grand  
9 Jury in this case?

10 A. Yes, I do.

13:58:37

11 Q. And do you remember the first time you appeared?

12 A. Yes, I do.

13 Q. And what date was that?

14 A. October 17th, 2013.

15 Q. Did you have to come from Artesia to -- or Wilcox to the  
16 Grand Jury here to testify?

13:58:44

17 A. Yes, sir, from Wilcox.

18 Q. Is it possible that the reason why the PowerPoint slides  
19 that the jury saw has the date of October 16th, 2013, is that  
20 you downloaded it the day before you came to Grand Jury?

13:59:00

21 A. Yes, sir.

22 MR. KLEINDIENST: Okay. That's all I have.

23 THE COURT: Mr. Chapman, any questions based upon the  
24 jurors' questions?

25 MR. CHAPMAN: No, Your Honor.

13:59:10

~~Allen Foraker - Redirect Examination~~

1 THE COURT: Thank you. You may step down.

2 (Further proceedings held on the record not included in  
3 this transcript.)

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C E R T I F I C A T E

I, CANDY L. POTTER, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 4th day of June, 2018.

s/Candy L. Potter  
Candy L. Potter, RMR, CRR